

11
No. 84-351-CFX
Status: GRANTED

Title: Atascadero State Hospital and California Department
of Mental Health, Petitioners
v.
Douglas James Scanlon

Docketed:
August 31, 1984

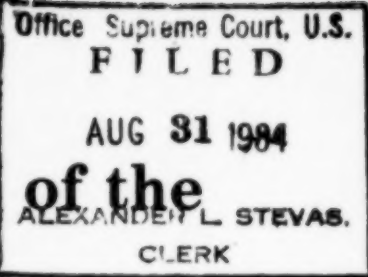
Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Ryan, James E.

Counsel for respondent: Holle, Marilyn

Entry	Date	Note	Proceedings and Orders
1	Aug 31 1984	G	Petition for writ of certiorari filed.
3	Sep 24 1984		Order extending time to file response to petition until November 3, 1984.
4	Oct 6 1984		Brief of respondent Douglas J. Scanlon in opposition filed.
5	Nov 6 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Nov 7 1984		DISTRIBUTED. November 21, 1984
7	Nov 26 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Nov 26 1984		Petition GRANTED.
10	Jan 7 1985		***** Order extending time to file brief of petitioner on the merits until January 18, 1985.
12	Jan 7 1985		Order extending time to file brief of respondent on the merits until February 25, 1985.
13	Jan 18 1985		Brief of petitioners Atascadero St. Hosp., et al. filed.
14	Jan 18 1985		Joint appendix filed.
15	Jan 18 1985		Brief amicus curiae of United States filed.
16	Feb 5 1985		SET FOR ARGUMENT. Monday, March 25, 1985. (4th case).
17	Feb 25 1985		Brief amicus curiae of Disability & Employment Advocacy Project filed.
18	Feb 25 1985		Brief amicus curiae of Alan Cranston, et al. filed.
19	Feb 26 1985		Application for leave to exceed the page limitations for respondent's brief on the merits filed (A-655), and order denying same by Rehnquist, J., on February 27, 1985.
20	Feb 26 1985		
21	Feb 22 1985		Brief amicus curiae of ACLU Foundation filed.
22	Feb 28 1985		Record filed.
23	Mar 4 1985		Brief of respondent Douglas J. Scanlon filed.
24	Mar 4 1985		CIRCULATED.
25	Mar 18 1985	X	Reply brief of petitioner Atascadero State Hospital, et al. filed.
26	Mar 25 1985		ARGUED.

84-351
No. _____



**In the Supreme Court of the
United States
OCTOBER TERM, 1983**

ATASCADERO STATE HOSPITAL and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

Petitioners,

v.

DOUGLAS JAMES SCANLON,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN K. VAN DE KAMP, Attorney General
of the State of California
THOMAS E. WARRINER, Assistant Attorney
General
ANNE S. PRESSMAN,
JAMES E. RYAN,*
Deputy Attorneys General
3580 Wilshire Boulevard, Suite 800
Los Angeles, California 90010
Telephone: (213) 736-2279
Attorneys for Petitioners

*Counsel of Record

QUESTION PRESENTED

1. Does the doctrine of sovereign immunity as exemplified by the Eleventh Amendment to the United States Constitution bar private actions in federal courts under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) against states and their agencies?

PARTIES TO THE PROCEEDINGS

Petitioners Atascadero State Hospital and California Department of Mental Health are administrative entities under the aegis of the State of California and pray that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 13, 1984. Respondent is Douglas James Scanlon, an applicant for employment with petitioner first-named above.

TOPICAL INDEX

	Page
Question Presented	i
Parties To The Proceedings	ii
Table Of Authorities Cited	iv
Opinions Below	1
Jurisdiction	2
Constitutional And Statutory Provisions Involved	2
Statement Of The Case	5
Reasons For Granting The Writ	7
A. Introduction	7
B. The Ninth Circuit's Decision Is In Direct Conflict With Decisions of the Courts of Appeals for the First and Eighth Circuits	8
C. The Ninth Circuit Decision on the Sovereign Immunity Question Is Erroneous Both in Its Analysis and Conclusions	9
Conclusion	20
Appendix	
Ninth Circuit Court of Appeals Opinion (June 13, 1984)	A-1
United States Supreme Court Order (March 19, 1984)	A-6
Ninth Circuit Court of Appeals Opinion (May 24, 1982)	A-7
District Court Opinion and Order (January 31, 1980)	A-22
Ninth Circuit Court of Appeals Order (August 9, 1984)	A-25
Ninth Circuit Court of Appeals Order (July 11, 1984)	A-26

TABLE OF AUTHORITIES CITED

Cases	Page
Bakersfield City Sch. Dist. of Kern Cty. v. Boyer, 610 F.2d 621 (9th Cir. 1979).....	14
Ciampa v. Massachusetts Rehabilitation Com'n., 718 F.2d 1 (1st Cir. 1983).....	8, 9, 12, 13
Consolidated Rail Corp. v. Darrone (<i>sub. nom.</i> : Le Strange v. Consolidated Rail Corp.), 465 U.S.____, 104 S.Ct. 1248.....	6, 13
Cory v. White, 457 U.S. 85 (1982).....	10
Edelman v. Jordan, 415 U.S. 651 (1974).....	8, 11, 13, 14, 18, 19
Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973).....	8, 11-16, 19
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).....	10, 17
Florida Dept. of Health v. Fla. Nursing Home Assn., 450 U.S. 147 (1981).....	9, 11, 15, 17
Guardians Ass'n. v. Civ. Serv. Com'n. of City of N.Y., ____ U.S.____, 103 S.Ct.3221 (8th Cir. 1983).....	14
Miener v. State of Mo., 673 F.2d 969 (1982), <i>cert.</i> <i>den.</i> , 459 U.S. 909 (1982).....	9, 13
Parden v. Terminal R. Co., 377 U.S. 184 (1964).....	10, 15-19
Pennhurst State School & Hosp. v. Halderman ____ U.S.____, 104 S.Ct. 900(1984).....	10, 12
Petty v. Tennessee-Missouri Comm'n., 359 U.S. 275 (1959).....	15-19
Quern v. Jordan, 440 U.S. 332 (1979).....	8, 12, 13

Statutes

Civil Rights Act of 1964 Title VI (42 U.S.C. §2000d <i>et. seq.</i>).....	4, 14
Fair Labor Standards Act of 1938 (29 U.S.C. §216(b)).....	13, 14

Rehabilitation Act of 1973**§504**

(29 U.S.C. § 794)..... passim

§505(a)(2)

(29 U.S.C. § 794a(a)(2) passim

Rules**45 Code of Federal Regulations****§84.3(f)**..... 15**§84.6** 15**Constitutions****United States Constitution****Amendment XI** passim



No. _____

**In the Supreme Court of the
United States
OCTOBER TERM, 1983**

ATASCADERO STATE HOSPITAL and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

Petitioners,

v.

DOUGLAS JAMES SCANLON,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit, filed on June 13, 1984, is reported at 735 F.2d 359 and is reprinted herein, commencing at Appendix page A-1.

Previous thereto, on grounds not related to the question presented herein, this Court on March 19, 1984 granted a petition for writ of certiorari by respondent Scanlon,

vacating a prior decision of the Court of Appeals (677 F.2d 1271 (9th Cir. 1982)) and remanding the matter for reconsideration by the appellate tribunal. 465 U.S. ____, 104 S.Ct. 1583. This Court's Order is reproduced at page A-6 of the Appendix herein. The Court of Appeals' prior Opinion, filed May 24, 1982, is reproduced at Appendix page A-7.

The initial Opinion and Order of the United States District Court for the Central District of California dismissing respondent's complaint was not reported but is set forth at Appendix page A-22.

Recent Orders of the Court of Appeals staying issuance of mandate in these proceedings pending the instant petition are included in the Appendix at pages A-25 and A-26.

JURISDICTION

The Opinion of the Court of Appeals was entered on June 13, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XI:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

29 U.S.C. § 794, as amended Pub.L. 95-602, Title I, § 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987:

"Nondiscrimination under federal grants and programs; promulgation of rules and regulations

“No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.”

29 U.S.C. § 794a, Pub.L. 93-112, Title V, § 505, as added Pub.L. 95-602, Title I, § 120, Nov. 6, 1978, 92 Stat. 2982:

“Remedies and attorney fees

“(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a

court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

“(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

“(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”

42 U.S.C. §2000d, Pub.L. 88-352, Title VI, §601, July 2, 1964, 78 Stat. 252:

“Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on grounds of race, color, or national origin

“No person in the United States shall, on the ground of race, color, or national origin, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

STATEMENT OF THE CASE

The decision of the Court of Appeals raises the significant federal question of whether the mere receipt of federal financial assistance under the Rehabilitation Act of 1973 by a state employer subjects that agency to the jurisdiction of the federal district court in a private civil action commenced by a job applicant under section 504 of that Act, notwithstanding the Eleventh Amendment to the United States Constitution and the doctrine of sovereign immunity embodied therein.

This action was commenced on November 21, 1979 by respondent Douglas James Scanlon, who alleged that petitioner Atascadero State Hospital (administered by petitioner California Department of Mental Health) in 1978 refused to employ respondent as a graduate student assistant-recreation therapist solely because of his physical handicap, i.e. diabetes mellitus and lack of vision in one eye. Respondent further alleged that petitioners were recipients of federal financial assistance, and that their action violated section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and pendent State fair employment laws. Monetary, injunctive and declaratory relief were sought.

Petitioners responded to the complaint by moving to dismiss the action on two grounds: (1) that petitioners were immune from suit in federal court in private actions under section 504 by reason of sovereign immunity; and (2) that respondent had failed to allege an essential element for a claim under section 504, to wit, that the federal assistance allegedly received by petitioners was for the primary purpose of providing employment.

The District Court granted petitioners' motion and ordered the action dismissed, holding that the state agencies indeed were protected by the Eleventh Amend-

ment grant of immunity. The court rejected petitioners' second grounds for dismissal. (App. p. A-24.)

The Court of Appeals for the Ninth Circuit, on the other hand, accepted the premise of the aforementioned second grounds and affirmed dismissal on that basis, never reaching the sovereign immunity question. (App. p. A-7.)

In November 1982, respondent petitioned this Court for a writ of certiorari, presenting, in essence, the question of whether, in order for a qualified handicapped person to state a viable claim under section 504, the federal financial assistance alleged to have been received by an employer must have been for the primary purpose of providing employment. (U.S. Sup. Ct. Dock. No. 82-5812.)

This same question was presented in a related case, *Consolidated Rail Corp. v. Darrone* (sub. nom.: *Le Strange v. Consolidated Rail Corp.*), which this Court subsequently accepted for review. (U.S. Sup. Ct. Dock. No. 82-862.) On February 28 of this year the Court handed down its Opinion in the *Consolidated Rail Corp.* case, holding that an employer could be sued under section 504 regardless of the purpose of the federal financial assistance it had received. (465 U.S. ____, 104 S.Ct. 1248.)

Consequently, on March 19, 1984 this Court granted respondent's petition for writ of certiorari, vacated the Court of Appeals decision and remanded the matter for further consideration in light of the *Consolidated Rail Corp.* opinion. (456 U.S. ____, 104 S.Ct. 1583; App. p. A-6.)

On remand, the Court of Appeals for the Ninth Circuit noted the *Consolidated Rail Corp.* decision and found it to be controlling with respect to the issue initially determined on appeal in this action. The court then proceeded

to address the sovereign immunity question previously not decided on appeal. In an Opinion by the Honorable Ben C. Duniway, in which the Honorable Warren J. Ferguson and the Honorable Richard B. Kellam of the United States District Court for the Eastern District of Virginia sitting by designation concurred, the court reversed the District Court and remanded the matter for further proceedings. The court concluded that the Rehabilitation Act of 1973 literally included States as potential defendants in private actions brought by individuals and that petitioners, by allegedly receiving federal funds under said Act, had consented to be sued thereunder. (___F.2d___; App. pp. A-3, 5.)

REASONS FOR GRANTING THE WRIT

A. Introduction

This case involves an issue of substantial importance as to which the Court of Appeals for the Ninth Circuit is in direct conflict with the Courts of Appeals for the First and Eighth Circuits. That issue concerns whether States and their agencies may be sued in federal courts by private litigants in actions arising under section 504 of the Rehabilitation Act of 1973, notwithstanding the doctrine of sovereign immunity as exemplified by the Eleventh Amendment to the United States Constitution.

The import of the decision below is to subject to federal court jurisdiction an entirely new class of defendants, absent any expression of Congressional intent to do so and contrary to the decisions of this Court on the issue of sovereign immunity. The holding that States are included within the class of potential defendants under the Rehabilitation Act constitutes an effort by the Court of Appeals to change the standard by which Congressional abrogation of States' immunity traditionally has been measured; and

the finding that the mere acceptance of federal financial assistance under the Act constitutes an implied consent to suit contravenes settled and recent pronouncements by this Court on that point.

It is respectfully requested by petitioners that this Court should review the decision of the Ninth Circuit and, after review, reverse that decision.

B. The Ninth Circuit's Decision Is In Direct Conflict With Decisions of the Courts of Appeals for the First and Eighth Circuits

In *Ciampa v. Massachusetts Rehabilitation Com'n.*, 718 F.2d 1, 3 (1st Cir. 1983), the Court of Appeals for the First Circuit noted that the test for determining whether Congress in specific legislation intended to abrogate States' Eleventh Amendment immunity has been consistently applied by this Court in cases exemplified by *Quern v. Jordan*, 440 U.S. 332, 343-345 (1979), *Edelman v. Jordan*, 415 U.S. 651, 672-673 (1974), and *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 285 (1973).

In summary, that test requires a showing of unequivocal Congressional intent to override States' immunity, either by explicit language in the statute under review or by such overwhelming implication from the text as would leave no room for any other reasonable construction. The intent to abrogate will not be found in implication or inference.

Applying this standard to private civil actions under section 504 of the Rehabilitation Act of 1973, the *Ciampa* court found that neither the statute nor relevant legislative history indicated that Congress even considered the issue of, let alone intended to override, States' Eleventh Amendment immunity. 718 F.2d at 3.

Relying upon this Court's holding in *Florida Dept. of Health v. Fla. Nursing Home Assn.*, 450 U.S. 147, 150 (1981), the court in *Ciampa* also rejected the argument that the state had waived its sovereign immunity by accepting federal financial assistance. 718 F.2d at 3-4.

In another section 504 case, the Court of Appeals for the Eighth Circuit in *Miener v. State of Mo.*, 673 F.2d 969 (1982), *cert. den.*, 459 U.S. 909, 916 (1982), also upheld States' immunity in such cases, employing much the same analysis and Supreme Court authorities as relied upon in *Ciampa*, and dismissed the plaintiff's claims for monetary, injunctive and declaratory relief.

To the contrary, and standing alone, the Court of Appeals below has held that the Rehabilitation Act literally includes States within the class of defendants against whom private suits may be brought (App. p. A-3), and that a State which accepts federal financial assistance under that Act implicitly consents to such suits. (App. p. A-5.)

In reaching these conclusions the Ninth Circuit acknowledges that it is in direct conflict with the First (*Ciampa*) and Eighth (*Miener*) Circuits, but states that it disagrees with those decisions. (App. p. A-5.)

Petitioners respectfully submit that this conflict should be resolved by this Court through writ of certiorari review and, as argued below by petitioners, upon such review the Ninth Circuit decision should be reversed as erroneous.

C. The Ninth Circuit Decision on the Sovereign Immunity Question Is Erroneous Both in Its Analysis and Conclusions

The deference to be accorded the doctrine of sovereign immunity and the breadth of its continuing vitality as a check on federal judicial power were recently iterated by

this Court in *Pennhurst State School & Hosp. v. Halderman* ____ U.S. ____, 104 S.Ct. 900, 907 (1984):

“ ‘That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.*’ (*Ex parte State of New York No. 1*, 256 U.S. 490, 497 (1921) (emphasis added)).”

This bar of sovereign immunity inures irrespective of the nature of the relief sought, whether in law or equity. *Pennhurst, etc., supra*, 104 S.Ct. at 908; *Cory v. White*, 457 U.S. 85, 90-91 (1982).

As noted in the *Pennhurst* decision, *supra*, 104 S.Ct. at 907, Congress may in cases of predominant federal interests abrogate States’ immunity (see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)), or a State may waive its immunity and consent to suit in federal court (see *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964)). Before declaring that sovereign immunity has been swept away in either of these circumstances, however, this Court has consistently required a most stringent, empirical demonstration of such intent and/or consent.

When this Court's decisions in the area of sovereign immunity are examined, as petitioners now propose to do, it is submitted that it becomes manifest that in the context of section 504 suits there has been no abrogation of sovereign immunity by Congress, nor has there been any waiver of such immunity by these petitioners. At the same time, petitioners respectfully suggest that in reaching the conclusions that it did, the Ninth Circuit erroneously analyzed this Court's opinions on the issue, resulting in a mixing of precepts and decisions on the questions of abrogation and waiver in a fashion which confuses and devitalizes the two.

Any analysis of the case law on the subject of sovereign immunity must proceed from the general proposition that the history and tradition of that doctrine and its exemplification in the Eleventh Amendment stand as a barrier, by reason of which a federal court is not competent to render judgment against a nonconsenting State. The question then becomes whether Congress in the legislation under scrutiny "has brought the States to heel, in the sense of lifting their immunity from suit in federal court." *Employees v. Missouri Public Health Dept.*, *supra*, 411 U.S. at 283-284.

It is not enough that States may be thoroughly enmeshed in the statutory scheme or even explicitly mentioned as subject to various of the legislative provisions. (See *Florida Dept. of Health v. Fla. Nursing Home Assn.*, *supra*, 450 U.S. 147.) Rather, this initial inquiry seeks to determine "the threshold fact of Congressional authorization to *sue* a class of defendants which *literally* includes States." *Edelman v. Jordan*, *supra*, 415 U.S. at 672. (Emphases added.) It is important to emphasize that this initial or threshold finding concerns Congressional intent to sweep away States' immunity *from suit in federal courts*, not an intent that States otherwise be covered by

the subject legislation.. *Employees v. Missouri Public Health Dept.*, *supra*, 411 U.S. at 285-286.

In *Quern v. Jordan*, *supra*, 440 U.S. at 345, this Court cast this threshold search as one which looks to *explicit* and *clear* language on the face of the legislation that the immunity of the States has been abrogated, or to a legislative history which focuses directly on the question of state liability and which shows that Congress *considered* and firmly *decided* to abrogate Eleventh Amendment protection.

The test employed in determining abrogation is a strict one and was recently repeated, as was the underlying policy, in *Pennhurst State School & Hosp. v. Halderman*, *supra*, 104 S.Ct. at 907:

“ . . . Similarly, although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, . . . we have required an *unequivocal expression* of congressional intent . . . Our reluctance to infer that a State’s immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A State’s constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.” (First emphasis added.)

The Rehabilitation Act of 1973 (29 U.S.C. § 701, *et seq.*) is *silent* with respect to States being liable in federal court private actions. The relevant legislative history likewise gives no indication of any Congressional intention to extinguish States’ sovereign immunity. As the court in *Ciampa v. Massachusetts Rehabilitation Com’n.*, *supra*, 718 F.2d at 3, remarked, these sources of intent indicate

that Congress did not even *consider* the issue of States' immunity.¹

The Ninth Circuit below acknowledged these facts when it stated in its Opinion:

“This is not a case in which the Act expressly provides for a state liability, as some statutes do . . . Nor is this a case in which the legislative history makes it clear that Congress intended to make states liable, regardless of their consent.” (App. p. A-3.)

Petitioners submit that this finding of silence should end the inquiry on abrogation, just as it did in *Quern v. Jordan*,² *Edelman v. Jordan* and *Employees v. Missouri*.

The *Employees* decision is of particular application. There, the argument was made that Congress had indeed lifted States' immunity under the Fair Labor Standards Act of 1938. (29 U.S.C. § 216(b).) This Court noted in its opinion that, just as here with respect to the Rehabilitation Act of 1973, the State defendants in that case were *literally* covered by the Act.³ What was found lacking,

¹In fact, as mentioned in *Ciampa, supra*, 718 F.2d at 3, Congress did not even provide for a private cause of action under the Act, although all indications are that an implied remedy does exist. See *Consolidated Rail Corp. v. Darrone, supra*, 104 S.Ct. at 1252, n. 7, and *Miener v. State of Mo., supra*, 673 F.2d at 973, and cases collected therein. Petitioners, while not conceding the point, have not raised below the issue of whether a private cause of action exists.

²“ . . . But we need not reach the question whether an express waiver is required because neither the language of the statute nor the legislative history discloses an intent to overturn the States' Eleventh Amendment immunity by imposing liability directly upon them.” *Quern v. Jordan, supra*, 440 U.S. at 344, n. 16.

³In fact, the statutory provisions examined in *Employees* went far beyond anything found in the Rehabilitation Act of 1973. In relevant part, section 216(b) of the FLSA provided: “Any employer who

however, was any indication by *clear language* that Congress intended to subject States *to suit in federal courts* notwithstanding the Eleventh Amendment. 411 U.S. at 285.

The Ninth Circuit decision at bar is directly contrary to the holding in *Employees* and other decisions of this Court. While recognizing that the Court's analysis is governed by the inquiry announced in *Edelman*, that is: Does the subject enactment by its terms authorize *suit* by designated plaintiffs against a general class of defendants which *literally* includes States or their instrumentalities (App. p. A-3), the Opinion below proceeds to either ignore or misconstrue the critical terms of that inquiry as emphasized just above. The Rehabilitation Act does *not* authorize private *suit* by anyone against anyone.⁴ Perforce, the Act does not provide reference to a general class of defendants which *literally* includes States or their instrumentalities.

violates the provisions . . . of this Act shall be liable to the employee or employees affected. . . Action to recover such liability may be maintained in any court of competent jurisdiction. . . ." 29 U.S.C. §216(b). As mentioned earlier herein, the Rehabilitation Act does not even mention a private remedy, let alone authorize jurisdiction in all courts.

⁴Section 505(a)(2) of the Rehabilitation Act (29 U.S.C. §794a(a)(2)) *does* make available to handicapped persons . . . aggrieved by recipients of federal financial assistance the remedies, procedures and rights provided under Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d et seq.). Again, though, Title VI by its terms also does not authorize private *suits*, or *literally* include States as potential defendants. Only recently has this Court confirmed the existence of an *implied* cause of action under Title VI, *Guardians Ass'n. v. Civ. Serv. Com'n. of City of N.Y.*, ___ U.S. ___, 103 S.Ct. 3221 (1983); and in the only reported appellate decision dealing with the issue of sovereign immunity in the context of a Title VI action, States' immunity has been upheld. (*Bakersfield City Sch. Dist. of Kern Cty. v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979).)

Instead, the Ninth Circuit focuses on the observation that the Rehabilitation Act “contains extensive provisions under which states are the express intended recipients of federal assistance.”⁵ (App. p. A-3.) This, of course, is no different a set of circumstances, nor less a degree of State involvement in the overall statutory scheme, than was unsuccessfully presented to this Court in the *Employees* and *Florida Dept. of Health* cases, *supra*.

The Ninth Circuit’s citation of *Petty v. Tennessee-Missouri Comm’n.*, 359 U.S. 275 (1959) and *Parden v. Terminal R. Co.*, *supra*, 377 U.S. 184, as authority for its resolution of the threshold abrogation question, demonstrates that it has mixed this Court’s decisions on waiver with those concerning abrogation.

Petty was a *waiver* or “consent to be sued” case. The States of Tennessee and Missouri formed a compact to build a bridge and operate ferries across the Mississippi River. In that compact, submitted for approval by Congress, the States stipulated that they would have the power to sue and be sued in their own names. In granting its consent to

⁵The Opinion also notes that an implementing regulation (45 C.F.R. § 84.3(f)) broadly defines recipients to include States. Neither this nor any other relevant regulation, however, in any way addresses suits in federal courts or States’ immunity. The regulations *do* concern a number of issues and procedures under the Act, including governmental sanctions, wherein the inclusion of States as “recipients” is germane. (See, e.g., 45 C.F.R. §84.6.) To infer that 45 C.F.R. § 84.3(f) lends support to a finding that sovereign immunity has been abrogated is to deem those regulations far more pervasive weight than even the promulgating federal agency would accord them. In paragraph 8, subpart A, of Appendix A to 45 C.F.R. Part 84, “Analysis of Final Regulation,” it is stated: “Private rights of action. . . To confer such a [private] right [of action] is beyond the authority of the executive branch of Government.” (Inserts added.) Suffice to say, that to confer or imply by regulation a right to sue States in federal courts, notwithstanding sovereign immunity, would constitute an even greater ultra vires effort.

the arrangement, Congress added the proviso that nothing contained in said compact shall be construed to affect, impair or diminish any right, power or jurisdiction of any court of the United States. 359 U.S. at 277.

When the Eleventh Amendment was raised in a subsequent action under the Jones Act, this Court had little difficulty in *Petty* in finding a clear waiver of immunity:

“The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached. So if there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition attached by Congress is accepted and acted upon by the two States.” 359 U.S. at 281-282.

“ . . . [T]he States [by] accepting [those conditions] . . . waived any immunity from suit which they otherwise might have.” 359 U.S. at 280 (Inserts added.)

Parden, likewise, was a case concerned with waiver, not abrogation.⁶ As this Court noted at the outset of the Opinion in that case:

“ . . . [T]he State’s freedom from suit . . . does not protect it from a suit to which it has *consented*. . . We think [defendant] Alabama has *consented* to the present suit.” 377 U.S. at 186. (Insert and emphases added.)

Having found Congressional intent to abrogate States’ immunity clear from both the language of the Act itself and

⁶“The *Parden* case in final analysis turned on the question of waiver.” *Employees v. Missouri Public Health Dept.*, *supra*, 411 U.S. at 282.

its legislative history, this Court in *Pardon* held the situation analogous to that presented in *Petty*. As a result, Alabama, by operating an interstate railroad after enactment of the Federal Employers' Liability Act and its concomitant conditions of amenability to suit in federal courts, was found to have consented to such suits. 377 U.S. at 192-196.

In both the *Petty* and *Parden* decisions, then, as was the case in *Fitzpatrick v. Bitzer*, *supra*, 427 U.S. 445, the Court was satisfied that Congressional intent to *abrogate* immunity was clear, and devoted its analysis to the question of *waiver*. Here, the Ninth Circuit erroneously relies on the holdings of those cases to support its finding, in the first instance, of a Congressional intent to *abrogate*.

Even bypassing the abrogation question for purposes of argument, the Ninth Circuit's conclusion that petitioners, "if [they have] . . . participated in and received funds from programs under the Rehabilitation Act, . . . [have] implicitly consented to be sued as . . . recipient(s) under 29 U.S.C. § 794" (App. p. A-5), also runs contrary to this Court's teachings on the issue of *waiver*. Although this Court has declined to pursue any examination of the waiver question when the fact of abrogation is initially found lacking (see fn. 2, *supra*), the cases which *have* found it necessary to address that issue clearly demonstrate the lower court's error.

In *Florida Dept. of Health v. Fla. Nursing Home Assn.*, *supra*, 450 U.S. at 150, for instance, this Court held that *neither participation in and receipt of federal assistance under a government program, nor a concomitant agreement to obey federal law, is sufficient to waive the protection of the Eleventh Amendment*. Moreover, in that case the Court was called upon to examine the Medicaid Act (42 U.S.C. § 1396 *et seq.*), a statutory

scheme which contains a vastly greater degree of participation on the part of member States and attendant federal control thereover, including requiring an agreement by States to obey federal law, than is found in the Rehabilitation Act.

To the same effect is the following statement from *Edelman v. Jordan*, *supra*, 415 U.S. at 673:

"The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts."

The Ninth Circuit concludes, however, that "in this case, there is more than the 'mere fact' of state participation" (App. p. A-5), but the decision never identifies what "more" there is. If the basis for this comment is the same as the court below relied upon in concluding that abrogation was intended, then the finding of waiver is similarly wanting, for the test in determining waiver is no less strict:

"... [W]e will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Florida Dept. of Health v. Fla. Nursing Home Assn.*, *supra*, 450 U.S. at 150, quoting from *Edelman v. Jordan*, *supra*, 415 U.S. at 673.

Furthermore, to rely on the decisions in *Petty* and *Parden* on this waiver issue also would be misplaced. As discussed previously herein, where the statute involved does not by its terms authorize suit literally against States, the *Parden* and *Petty* analyses have no application. This

was a specific holding of the *Edelman* decision. 415 U.S. at 672. Moreover, in *Petty*, there was a finding of an *express* waiver by virtue of the States' execution of a sue-and-be-sued provision and the acceptance by those States of a Congressional condition of amenability to suit in federal court, 359 U.S. at 277-280. In *Parden*, while there was no *express* waiver, the Court alluded to the *unique* legislative and case law precedent respecting governmental control over interstate rail carriers, by virtue of which the Court felt constrained to find a waiver, setting that case apart from all others on the issue of waiver:

“ ‘The fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. In fact, the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included. (*California v. Taylor* (1957)) 353 U.S., at 564.’

“ . . . Thus we could not read the FELA differently here without undermining the basis of our decision in *Taylor*,” 377 U.S. at 189. (Insert added.)

That the *Parden* decision stands as a unique and isolated exception to the settled rule on waiver of immunity has been noted by this Court:

“ . . . The dramatic circumstances of the *Parden* case, which involved a rather isolated state activity can be put to one side.” *Employees v. Missouri Public Health Dept.*, *supra*, 411 U.S. at 285.

“ . . . For me at least, the concept of implied consent or waiver relied upon in *Parden*

approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver." *Id* at 296, concurring opinion of Justice Marshall.

Petitioners submit, therefore, that the Ninth Circuit decision is in error as to its analyses and conclusions respecting both the finding of abrogation and the finding of waiver under the Rehabilitation Act. Given the impact that such a decision may have upon future litigation under the Act, it is respectfully requested that this Court agree to review and reverse same.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that a Writ of Certiorari be issued to review the decision of the Court of Appeals for the Ninth Circuit in this case.

DATED: _____

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
THOMAS E. WARRINER,
Assistant Attorney General
ANNE S. PRESSMAN,
JAMES E. RYAN,
Deputy Attorneys General

By _____
JAMES E. RYAN

Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS JAMES SCANLON,)	
Plaintiff-Appellant,)	No. 80-5201
vs.)	
ATASCADERO STATE HOSPITAL)	(D.C. No.
and CALIFORNIA DEPARTMENT)	79-4523-MRP)
OF MENTAL HEALTH,)	
Defendants-Appellees.)	<u>OPINION</u>

Appeal from the United States District Court
for the Central District of California
Honorable Mariana R. Pfaelzer, District Judge, Presiding
Argued September 15, 1981 and Submitted October 15, 1981
Decided May 24, 1982, 677 F.2d 1271
Certiorari Granted; Vacated and Remanded March 19, 1984
S.C. No. 82-5812

Before: DUNIWAY and FERGUSON, Circuit Judge
and KELLAM,* District Judge

DUNIWAY, Circuit Judge:

We consider for the second time Scanlon's claim of employment discrimination against the handicapped under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The district court dismissed the action on the ground of state immunity under the Eleventh Amendment. We reverse.

*The Honorable Richard B. Kellam, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

I. BACKGROUND.

Scanlon alleged that he suffers from diabetes mellitus and lack of vision in one eye, that California's Atascadero State Hospital denied him a job as a graduate student assistant, and that this was discrimination in employment violating the Act. The state received federal financial assistance for the hospital under the Act. The defendants moved to dismiss on two grounds: (1) that § 794 does not apply to employment discrimination unless a primary objective of the federal financial assistance is to provide employment, and (2) that the Eleventh Amendment barred Scanlon's federal claim. The district court dismissed on the Eleventh Amendment ground. We affirmed the dismissal, but on the ground that there can be no private claim for relief under § 794 unless a primary objective of the federal financial assistance is to provide employment. *Scanlon v. Atascadero State Hospital*, 9 Cir., 1982, 677 F.2d 1271, 1272. The Supreme Court granted certiorari, vacated our judgment, and remanded for further consideration in the light of *Consolidated Rail Corporation v. Darrone*, 1984, ____ U.S. ____, 52 USLW 4301. *Scanlon v. Atascadero State Hospital*, 1984, ____ U.S. ____, 52 USLW 3686. *Consolidated Rail* is squarely in point on the § 794 question, and is contrary to our previous opinion.

We did not reach the Eleventh Amendment question in our opinion, 677 F.2d at 1272, but must do so now. *Consolidated Rail* did not touch on the issue of state immunity. No state or state agency was a defendant there.

II. STATE IMMUNITY UNDER THE ELEVENTH AMENDMENT.

Section 794 of the Rehabilitation Act broadly bars "discrimination under any program or activity receiving

federal financial assistance . . .” and § 794a(a)(2) provides remedies, procedures, and rights against “any recipient of Federal assistance. . . .” The Act contains extensive provisions under which states are the express intended recipients of federal assistance. *E.g.*, § 720 *et seq.* Accord 45 C.F.R. § 84.3(f) (implementing regulations broadly define “recipient” to include “any state or its political subdivision”). If states receive federal assistance under the statute, they plainly fall within the defined class of potential defendants.

The Eleventh Amendment of the United States Constitution broadly bars federal court actions by private parties, including actions by parties who are citizens of the state, against states and state agencies. *See generally Pennhurst State School and Hospital v. Halderman*, 1984, ___ U.S. ___, ___-___, (Jan. 23, 1984, slip op. at 6-10).

Section 5 of the Fourteenth Amendment gives Congress “power to enforce [its provisions] by appropriate legislation.” The question is whether Congress has done so in the Act that we are considering, where consent of the state can be inferred. We conclude that it has.

This is not a case in which the Act expressly provides for state liability, as some statutes do. *See, e.g., Fitzpatrick v. Bitzer*, 1976, 427 U.S. 445, 447. Nor is this a case in which the legislative history makes it clear that Congress intended to make states liable, regardless of their consent. *See, e.g., Hutto v. Finney*, 1978, 437 U.S. 678, 693-94.

Rather, this is a case in which a “congressional enactment . . . by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities,” and “the State by its participation in the program authorized by Congress had in effect consented to the abrogation of

that immunity." *Edelman v. Jordan*, 1974, 415 U.S. 651, 672. *Edelman* was not such a case because "the threshold fact of congressional authorization to sue a class of defendants which literally includes states [was] wholly absent." *Id.*

Other decisions of the Supreme Court apply the principle. *Petty v. Tennessee-Missouri Bridge Commission*, 1959, 359 U.S. 275, was an action under the Jones Act, 46 U.S.C. § 688 *et seq.*, which authorized personal injury actions by any seaman against his employer. *Id.* § 688. The states operated ferryboats under a compact to which Congress consented with a proviso that, the Court held, created a waiver of Eleventh Amendment immunity. In *Parden v. Terminal Railway of the Alabama State Docks Department*, 1964, 377 U.S. 184, the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, provided that "Every common carrier by railroad . . . shall be liable in damages. . . ." *Id.* § 51 (emphasis added). Under this broad statutory definition of potential defendants, a state's subsequent voluntary operation of a railroad constituted consent to suit.

We have recently decided two cases in which we applied the same principle. In *Mills Music, Inc. v. State of Arizona*, 9 Cir., 1979, 591 F.2d 1278, 1283-85, the federal statute, the old Copyright Act, former 17 U.S.C. § 1 *et seq.*, provided broadly that "any person . . . shall be liable. . . ." *Id.* § 101 (emphasis added) (compare present 17 U.S.C. § 50(a): "Anyone who violates . . ."). We held that the state agency, by using a copyrighted song to promote a state fair, voluntarily engaged in regulated activity and thus waived its Eleventh Amendment immunity. In *Department of Education, State of Hawaii v. Katherine D.*, 9 Cir., 1984, 727 F.2d 809, 818-19, the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.*, a statute often associated with the Rehabilitation Act, provided a broad private right of action, *id.* § 1415(e)(2),

in a context where state agencies would "inevitably" be parties to any dispute. We held that the state agency, by applying for and receiving federal funds under *id.* § 1412, waived its Eleventh Amendment immunity and consented to suit.

Scanlon expressly alleged that Atascadero State Hospital is a recipient of federal financial assistance under the Rehabilitation Act., see Complaint ¶ 4 [ER 3], and in reviewing the dismissal of his action we must assume this to be the case.

We decline to follow cases holding that the Eleventh Amendment bars actions against states under § 794, such as *Ciampa v. Massachusetts Rehabilitation Commission*, 1 Cir. 1983, 718 F.2d 1, 3-4, and *Miener v. State of Missouri*, Cir., 1982, 673 F.2d 969, 979-980-82. We disagree with those cases' reliance on *Edelman* and *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 1981, 450 U.S. 147, in holding that state acceptance of Rehabilitation Act funds does not waive Eleventh Amendment immunity with respect to suit under § 794. As we have seen (p.4) *supra*, *Edelman* itself distinguishes a case like this one. 415 U.S. at 672. *Florida Dep't of Health* is similar to *Edelman*. 450 U.S. at 150. In this case, there is more than the "mere fact" of state participation and, as we have shown, a different standard of waiver applies. See *Katherine D.*, 727 F.2d at 819.

We conclude that the Eleventh Amendment does not bar Scanlon's action because the state, if it has participated in and received funds from programs under the Rehabilitation Act, has implicitly consented to be sued as a recipient under 29 U.S.C. § 794.

The judgment is reversed and the action is remanded to the trial court for further proceedings consistent with this opinion.

Douglas James SCANLON, petitioner, v. ATASCADERO STATE HOSPITAL and California Department of Mental Health, No. 82-5812.

Case below, 677 F.2d 1271.

March 19, 1984. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Consolidated Rail Corporation v. Darrone*, 465 U.S. ___, 104 S.Ct. 1248, 78 L.Ed.2d ___ (1984).

Douglas James SCANLON,

Plaintiff-Appellant,

v.

ATASCADERO STATE HOSPITAL,
CALIFORNIA DEPARTMENT OF MENTAL
HEALTH, *Defendants-Appellees.*

No. 80-5201

United States Court of Appeals
Ninth Circuit

Argued Sept. 15, 1981

Submitted Oct. 15, 1981.

Decided May 24, 1982.

Plaintiff, who suffered from diabetes and lack of vision in one eye, brought suit alleging that he was denied a job as graduate assistant at hospital in violation of section of Rehabilitation Act and various California statutes. The United States District Court for the Central District of California, Mariana R. Pfaelzer, J., dismissed the action, and plaintiff appealed. The Court of Appeals, Duniway, Circuit Judge, held that (1) order was appealable, and (2) complaint did not state claim upon which relief could be granted.

Affirmed.

Ferguson, Circuit Judge, filed a dissenting opinion.

Appeal from the United States District Court for the Central District of California.

Before DUNIWAY and FERGUSON, Circuit Judges, and KELLAM, District Judge.

DUNIWAY, Circuit Judge: We affirm the dismissal of this action, brought under 29 U.S.C. § 794.

I. FACTS.

Scanlon alleges that he suffers from diabetes mellitus and a lack of vision in one eye, that he was denied a job as a graduate student assistant at Atascadero State Hospital, and that this was discrimination in employment contrary to § 504 of the Rehabilitation Act, 29 U.S.C. § 794 and to various California statutes. The hospital moved for dismissal of the complaint, arguing (a) that § 794 does not apply to employment discrimination unless a primary objective of the federal financial assistance is to provide employment, and (b) that Scanlon's claims were barred by the Eleventh Amendment. The district court rejected argument (a) but accepted argument (b), and on that ground dismissed the § 794 claim and the pendent state claims.

II. Appealability of the Order

The court's order merely dismissed the complaint; there is no judgment dismissing the action. Ordinarily, an order granting a motion to dismiss under rule 12(b)(6), F.R. Civ.P., carries with it a right to amend under rule 15(a), and thus is not an appealable final judgment. Here, however, the ruling was on a ground not curable by amendment, and it is clear that the court intended to dispose of the action. See *Scott v. Eversole Mortuary*, 9 Cir., 1975, 522 F.2d 1110, 1112. The order is appealable. However, the better practice would have been to enter a judgment of dismissal.

II. The Merits.

We affirm on the ground that the complaint does not and cannot state a claim upon which relief can be granted. We do not reach the question of the applicability of the Eleventh Amendment. Title 29 U.S.C. § 794 now reads in pertinent part as follows:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

In *Trageser v. Libbie Rehabilitation Center, Inc.*, 4 cir., 1978, 590 F.2d 87, 89, the Fourth Circuit decided that a private action under § 794 to redress employment discrimination cannot be maintained unless a primary objective of the federal financial assistance is to provide employment. The Second and Eighth Circuits have followed. *United States v. Cabrini Medical Center*, 2 Cir., 1981, 639 F.2d 908; *Carmi v. Metropolitan St. Louis Sewer District*, 8 Cir., 1980, 620 F.2d 672. See also *Simpson v. Reynolds Metals Co., Inc.*, 7 Cir., 1980, 629 F.2d 1226, 1232, 1234. For the reasons stated in *Trageser, supra*, we conclude that the order appealed from is correct.

Affirmed.

FERGUSON, Circuit Judge, dissenting:

My analysis of the Rehabilitation Act of 1973, of the 1978 Amendments to that Act, and of the legislative and administrative material which should guide our interpretation of that Act convinces me that the majority's decision in this case is in error. Accordingly, I dissent.

The issue in this case is whether Congress, by amending the Rehabilitation Act to "make available" the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964,"¹ actually limited, in a drastic way, the remedies that were already available to persons aggrieved under § 504 of the Act. No support for such a

view can be found in the Act, in the 1978 Amendments, or in the relevant legislative and administrative materials. Indeed, the only support that exists is the decision of the Fourth Circuit in *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1979). Neither that decision, nor those of the other courts that have followed it, can withstand scrutiny. The *Trageser* decision has been criticized by the Senate Committee on Labor and Human Resources,² by HEW,³ by the Department of Justice,⁴ and by commentators.⁵ It should not be followed by this court.

I. BACKGROUND

A. The Rehabilitation Act

Section 504 of the Act prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. Prior to the enactment of the 1978 Amendments, this section had been held to create a private right of action for individuals aggrieved by employment discrimination on the basis of handicap. See, e.g., *Whitaker v. Board of Higher Education*, 461 F. Supp. 99, 106-08 (E.D.N.Y. 1978); *Drennon v. Philadelphia Gen. Hosp.*, 428 F.Supp. 809, 815-16 & n.6 (E.D.Pa. 1977). The Department of Health, Education and Welfare had issued regulations implementing § 504 which prohibit employment discrimination against the handicapped by all recipients of federal financial assistance. E.g., 45 C.F.R. § 84.11 (1977).⁶ HEW also noted, in the analysis of its regulations, the existence of case law holding that § 504 creates a private right of action. 45 C.F.R. § 84 App. A subpar. 8 (1977). The conclusion reached by all of these authorities, that § 504 prohibits employment discrimination against the handicapped by every recipient of federal financial assistance, is supported by the language and clear intent of the Act itself. Section 504 provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or *be subject to discrimination under* any program or activity receiving Federal financial assistance.

29 U.S.C. §794 (emphasis added). Notably, the statute does not read "... or be subject to discrimination other than employment discrimination," not does it include any words of limitation characterizing the purpose which the federal funding must have before the rights guaranteed by §504 are available. Furthermore, a primary focus of the Rehabilitation Act was employment for the handicapped. Its purpose was "to see that these [handicapped] individuals do receive the services that they need, particularly that maximum efforts are made to develop a vocational goal for them." S.Rep. No. 318, 93d Cong., 1st Sess. 18, reprinted in [1973] U.S. Code Cong. & Ad. News 2076, 2092. The achievement of that goal is plainly impeded by the existence of discriminatory hiring practices in either the public or the private sector, and it would be odd indeed for Congress to condone such discrimination in programs administered with the help of federal funds.

B. The 1978 Amendments and Title VI

The courts recognized, under *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), that Congress had intended a private right of action to enforce the substantive rights specified in §504.⁷ *Lloyd v. Regional Transp. Authority*, 548 F.2d 1277, 1284-87 (7th Cir. 1977). However, the 1973 Act did not spell out federal department and agency procedures adequate to secure the enforcement of the rights it guaranteed, and federal

agencies were slow to enforce those rights. See Comment, "Employment Discrimination Act Against the Handicapped," 54 N.Y.U.L. Rev. 1173, 1192 (1979) [hereinafter cited as "Employment Discrimination"]. See also Linn, "Uncle Sam Doesn't Want You: Entering the Federal Stronghold of Employment Discrimination against Handicapped Individuals." 27 De Paul L. Rev. 1047 (1978). As a result, first Congress, and then President Ford, directed federal agencies to promulgate enforcing regulations. "Employment Discrimination," *supra*, at 1192. The resulting regulations did not distinguish among federally funded programs on the basis of the purpose of the federal funding. Instead, employment discrimination against the handicapped is prohibited in all such programs. See, e.g., 45 C.F.R. §84.11 (1977). Congress subsequently enacted the 1978 amendments, which were intended to codify as a statutory requirement the "Existing HEW practice" embodied in its regulations at 45 C.F.R. parts 84, 85. S.Rep.No. 890, 95th Cong., 2d Sess. 19 (1978), U.S. Code Cong. & Admin.News 1978, p. 7312. As already noted, the language of that enactment "made available" the procedures of Title VI to aid in the enforcement of §504.

Title VI, which prohibits racial discrimination in federally funded programs, provides as its most dramatic remedy a cutoff of federal funds to an offending program. 42 U.S.C. §2000d-1. Title VI also contains a provision which limits enforcement by a federal agency or department in the event of employment discrimination based on race: "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment." Section 604 of the Civil Rights Act of 1964, 42 U.S.C. §2000d-3.

The principal issue presented to us today is whether the 1978 Amendments in addition to explicitly making available to § 504 claimants the remedies of Title VI, also carried over the limitation on Title VI remedies effectuated by § 604. The crucial secondary issue concerns the proper scope of that limitation in the § 504 context, if indeed it was carried over at all by the 1978 Amendments. The *Trageser* court held that the § 604 limitation is broad enough in its customary title VI field of action to cut off all remedies available under Title VI when it applies at all. It held that the limitation was carried over in the same broad form by the 1978 Amendments, and concluded that, as amended, § 504 provides no remedy for employment discrimination unless the federal funding is provided for the purpose of an employment program.

Analysis shows that the *Trageser* court was wrong in each step of its syllogism. *Trageser* is wrong in its broad construction of § 604 in the Title VI context, wrong that the § 604 limitation was carried over to the Rehabilitation Act by the 1978 Amendments, and wrong in its conclusion that there is no remedy under § 504 for discrimination against the handicapped in a program receiving federal funds unless the purpose of those funds is for an employment program.

II. THE *TRAGESER* INTERPRETATION OF THE 1978 AMENDMENTS IS INCORRECT.

A. The Section 604 Limitations to Title VI Remedies Does Not Limit the Private Right of Action for Race-Related Employment Discrimination.

When Title VI was enacted, its sponsors clearly perceived the crucial distinction between the substantive right it codified and the remedy it provided. That sub-

stantive right, which belongs to individuals, can be remedied by private administrative action.

Senator Humphrey emphasized that individuals can go to court to enforce their rights and that the remedy of funding termination was simply one method for enforcing Title VI rights — “the method for . . . governmental *agencies* and activities covered by [the statute]. Senator Case supported Senator Humphrey’s view that the substantive rights established in Title VI “are not limited by the limiting words of [its remedial provisions].”

Employment Discrimination, *supra*, 54 N.Y.U.L.Rev. at 1189, *citing* 110 Cong. Rec. 5255 (1964) (emphasis added). Indeed, that distinction is plain on the face of § 604. If Congress has intended by § 604 to eliminate all remedies under Title VI for employment discrimination except where the purpose of the federal funding is employment, it could simply have legislated that nothing in Title VI “shall be construed to authorize action under this subchapter with respect to any employment practice” But that is not what § 604 says. It says that nothing in Title VI “shall be construed to authorize action under this subchapter *by any department or agency* with respect to any employment practice. . . .” 42 U.S.C. § 2000d-3 (emphasis added). The *Trageser* court, without any analysis, simply read these words out of the statute.⁸ The Ninth Circuit has never ruled on this question. I am not persuaded that we should defer to the “reasoning” of the *Trageser* court on this point, because I do not find any reasoning in *Trageser* on this point. I would adhere to the plain language of the statute, and hold that the § 604 limitation on Title VI only applies to enforcement actions by federal agencies and departments. When § 604 is read in this way, it is clearly not a bar to the

present action, even if, as I doubt, its limitation is to be applied to actions under the Rehabilitation Act.

B. The 1978 Amendments Did Not Make the § 604 Limitation on Title VI Enforcement Applicable to § 504.

The language of § 120(a) of the 1978 Amendments gives no clue that Congress believed it was limiting the existing remedies under § 504. It simply makes no sense that by using language which purports to "make available" the remedies of Title VI, Congress actually intended to deprive the handicapped of a crucial remedy. The *Trageser* court, in an apparent attempt to sidestep this obvious objection to its analysis, opined that rather than withdrawing any previously available remedies, the 1978 Amendment "simply confirms a plausible reading of § 504 as originally enacted."⁹ 590 F.2d at 89. I doubt that the reading proposed by the *Trageser* court is plausible even when nothing but the bare language of the 1978 Act is considered.¹⁰ When the legislative and administrative gloss reviewed above is considered, the *Trageser* reading of the original statute is utterly implausible.

Aside from the clear language of the amendment, there is another reason to doubt that Congress meant to limit § 504 in the way *Trageser* concludes it did. The limitation of § 604 does not deprive persons aggrieved under Title VI of a remedy. Victims of racially based employment discrimination will still have a remedy under Title VII, unless the employer in question has fewer than fifteen employees. 42 U.S.C. § 2000e-2(a)(1), 2000e(b). Those left unprotected by Title VII may still have a private action under Title VI.¹¹ See *Cannon v. University of Chicago*, 441 U.S. 677, 710-16, 99 S.Ct. 1946, 1964-67, 60 L.Ed.2d 560 (1979); Comment, "Employment Discrimination," *supra*, N.Y.U.L.Rev. at 1185-91. In

contrast, Title VII does not cover handicap discrimination, so the only federal remedies available are those provided by the Rehabilitation Act. The *Trageser* doctrine leaves victims of employment discrimination without any federal remedy at all.

The legislative history of Title VI - which was commonly referred to as the "cut-off-the-funds title" - shows clearly that Congress was anxious not to endanger important federal programs by an over-liberal use of this drastic remedy when other remedies for racially based employment discrimination were readily available. See, e.g., Hearings on H. R. 7152 Before the House Comm. on Rules, 88th Cong. 2d Sess. 379-80 (1964) (Remarks of Rep. Poff); id. at 197-200, 228 (Remarks of Rep. Avery). Congress tempered the remedies of its anti-discrimination legislation to preserve the goals of other important federal programs. By reading § 604 to exclude all remedies, rather than simply agency action, and then importing this broadened exclusion into the Rehabilitation Act, the *Trageser* "reasoning" makes a mockery of Congress's careful and measured approach.

This point was well put by Judge McMillian, concurring in *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672 (8th Cir. 1980). He wrote:

Even if § 604 is interpreted to restrict individual actions under Title VI, it does not follow that a similar restriction exists on individual actions under the Rehabilitation Act, which encompasses a different kind of statutory scheme than the Civil Rights Act of 1964 In the Civil Rights Act of 1964, the restriction of individual actions under Title VI merely means that individuals must proceed under Title VII against employment discrimination based on race, national origin, or

religion. Under the Rehabilitation Act, restriction of individual actions under § 794a (a)(2) would deny any remedy at all to many victims of discrimination.

Id. at 679-80 (McMillian, J., concurring). In the context of Title VI, § 604 operates to circumscribe, in a considered way, the choice of remedies available for discrimination in violation of that title. In the context of § 504 of the Rehabilitation Act, applied *Trageser*-style, § 604 operates as a blunderbuss. As Judge Orrick noted in *Hart v. County of Alameda*, 485 F.Supp. 66, 72 (N.D.Cal. 1979), "there is not a single word of legislative history to support [an inference that Congress intended to restrict the scope of Section 504 by importing the restrictions of Sections 604]; indeed, the overwhelming impression created by the legislative history of the 1978 Amendments is that congress intended to expand the remedies available under the Act."

CONCLUSION

The goal of eliminating discrimination against the handicapped is a laudable one, and one which congress has taken major steps to reach. The court today decides to turn its back on this goal. In so doing, the court flies in the face of the clear language of the Rehabilitation Act and the plain understanding and intent of Congress in enacting and amending that statute. I am therefore compelled to dissent.

FOOTNOTES

1. Rehabilitation Act of 1973 ["the Act"] section 505(a)(2), 29 U.S.C., section 794a(a)(2), as amended by Comprehensive Rehabilitation Services Amendments of 1978 ["the 1978 Amendments"], section 120 (a).
2. "[Trageser] is not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of [section 504], regardless of the designated use of the federal funds received by the employer in question." S.Rep.No. 316, 96th Cong., 1st Sess. 13 (1979).
3. Comment: Commenters suggested that under [Trageser] the Department has no authority to accept or resolve employment discrimination complaints under Section 504.

Response: The Guidelines reflect the Department's current interpretation of its authority. If and when it must be revised to conform to controlling judicial decisions, the new policy will be announced and will supersede the Guidelines.

Comments and Recommendations on Proposed Guidelines [now codified at 45 C.F.R. Part 84, Appendix B (1980)], 44 Fed. Reg. 17168, 17174 (1979).

These guidelines deserve special deference. They were developed in response to Executive Order 11914 (1976), which directed the Secretary of HEW to coordinate the implementation of section 504 by all federal departments and agencies to "issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary of Health, Education and Welfare." The coordinating function was transferred from HEW to the Attorney General by Executive Order 12250 (1980), which revoked Executive Order 11914.

4. As of 1980, the Attorney General was assigned responsibility for coordinating the enforcement of section 594 by federal departments and agencies. Executive Order 12250 (1980). See footnote 3, *supra*. In his analysis of rules promulgated under this authority see 28 C.F.R. sections 42.501-.540 (1980), the attorney general stated that

HEW has construed section 504 to prohibit employment discrimination against handicapped persons in all programs receiving Federal financial assistance Several courts have construed section 504 to cover employment discrimination. . . . To date, two courts of

appeals have taken a narrower view. See in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1976), *cert. den.*, 442 U.S. 947 [99 S.Ct. 2895, 61 L.Ed.2d 318] (1979); *Carmi v. Metropolitan St. Louis Sewer District*, No. 79-1325, [620] F.2d. [672] (8th Cir. May 6, 1980). . . .

The [*Trageser*] court's decision appears to rest solely on the language of section 120(a) of the Rehabilitation Act Amendments of 1978, which provides that "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available" to persons aggrieved because of section 504 violations. Accordingly, "in the absence of legislative history to the contrary," the court held that section 120(a) of the Rehabilitation Act Amendments of 1978 incorporated the limitations of Title VI coverage as to employment discrimination. *Id.* at 89.

The court, in its analysis, did not focus on the remedial purpose of section 504 to provide broad protections to handicapped persons. Nor did the court consider the legislative histories of the Rehabilitation Act of 1973 and its subsequent amendments, which reflect the continuing congressional concern for the employment problems of handicapped persons. See, e.g., S.Rep. No. 93-318, 93d Cong., 1st Sess. 18-19, 70 (1973); H.R. Rep.No. 95-1149, 95th Cong., 2d Sess. 16,18, 23-29, 34, 38, 42-43 (1978); S.Rep.No. 95-890, 95th Cong., 2d Sess. 8, 13, 20-21, 27, 36 (1978); H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 80-81, 94-96, 98, 102 (1978). Further, the legislative history of section 120(a), which apparently was not brought to the attention of the court, indicates that the provision was not intended to limit the scope of section 504, but was merely a legislative ratification of HEW'S enforcement procedures under section 504.

Section 120(a) was originally a provision in S. 2600 (95th Cong., 2d Sess., section 118(a) (1978)) the Senate version of the Rehabilitation Amendments of 1978 reported by the Senate Committee on Human Resources on May 15, 1978. The Committee stated, with respect to section 120(a):

It is the committee's understanding that the regulations promulgated by the Department of Health, Education

and Welfare with respect to procedures, remedies and rights under section 504 conform with those promulgated under Title VI. Thus, *this amendment codifies existing practice as a specific statutory requirement.* (Sen. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).) (Emphasis added).

In view of the legislative history of the Rehabilitation Act of 1973 and its amendments, HEW's administrative construction, the remedial nature of section 504 and the legislative history of section 120(a), the Department believes that the employment practices of recipients of Federal financial assistance are covered by section 504 regardless of the purpose of the assistance, and the Department's proposed regulations reflect this view (sections 42, 510-42, 513).

Nondiscrimination Based on Handicap in Federally Assisted Programs-Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 Fed. Reg. 37620, 37628 (1980). The analysis goes on to note that in view of *Trageser* and *Carmi*, the provisions relating to employment would not be enforced within the Fourth and Eighth Circuits unless the primary objective of the federal funding is employment. *Id.*

5. E.g., Comment, Employment Discrimination Against the Handicapped: Can *Trageser* Repeal the Private Right of Action? 54 N.Y.U.L.Rev. 1173 (1979).
6. (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies. . . . (3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

45 C.F.R. section 84.11 (1977). The part applies to "each recipient of Federal financial assistance from the Department of Health, Education and Welfare and to each program or activity that receives or benefits from such assistance." *Id.* section 84.2. There is no provision limiting the application of section 84.11 to programs where the purpose of the Federal funding is employment. These regulations were altered in response to the 1978 amendments. See 45 C.F.R. sections 84.2, 84.11 (1980).

7. Indeed, the Tenth Circuit recently noted: "Every court of appeals and district court, and there have been many, which have considered this question have held that a private right of action exists under the statute." (sic) *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372, 1377 (10th Cir. 1981) (collecting cases).
8. The *Trageser* court states in its opinion that "Title VI does not provide a judicial remedy for employment discrimination by institutions receiving federal funds unless (1) providing employment is a primary objective of the federal aid, or (2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid." 590 F.2d at 89 (footnotes omitted). One of the cases cited does hold that the section 604 limitation applies to private actions under Title VI. *Quiroz v. City of Santa Ana*, 18 FEP Cases 1138, 1140 (C.D. Cal. 1978). It offers no reasoning or authority in support of this conclusion. Furthermore, that case merely dismissed the complaint with leave to amend. Since the plaintiff was a CETA worker, his complaint could easily have been amended to avoid the issue altogether. The other cases cited by the *Trageser* court do not support its assertion.
9. Other courts have known better. The Eighth Circuit observed in *Simon v. St. Louis County, Mo.*, 656 F.2d 316, 319 n.6 (8th Cir. 1981), that *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 674-75 (8th Cir. 1980), which follows the reasoning and adopts the holding of *Trageser*, "limited what had been construed to be a broader private right of action under section 504. . . ." *Id.*
10. Civil rights statutes are to be construed as broadly as their language permits. *Griffin v. Breckinridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 1796, 23 L.Ed.2d 338 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437, 88 S.Ct. 2186, 2202, 20 L.Ed.2d 1189 (1968).
11. See note 8, *supra*. For cases holding that Title VI provides a private right of action see *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 & 696 nn. 20, 21, 99 S.Ct. 1945, 1957-58 & 1957 nn. 20, 21, 60 L.Ed.2d 560.

ENTERED

A-22

JAN 31 1980

FILED

JAN 31 1980
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEPUTY

DOUGLAS JAMES SCANLON,)

Plaintiff,)

v.)

ATASCADERO STATE HOSPITAL,)
CALIFORNIA DEPARTMENT OF)
MENTAL HEALTH,)

Defendants.)

CASE NO.
CV 79-4523 MRP

ORDER GRANTING
DEFENDANTS'
MOTION TO
DISMISS

Plaintiff herein alleges a cause of action under Section 504 of the Rehabilitation Act of 1973, as amended, 20 U.S.C. §794, together with pendent state claims on California Labor Code §1420 and California Government Code §11135, for employment discrimination on the basis of handicap. On January 28, 1980, the motion of defendants Atascadero State Hospital and California Department of Mental Health to dismiss the complaint under Rule 12(b) came on for hearing. After considering the papers submitted and hearing oral argument, the Court concludes that the plaintiff's claims are barred by the Eleventh Amendment to the United States Constitution and that the complaint must be dismissed in its entirety.

In this discussion, consideration must first be given to the plaintiff's claim under 20 U.S.C. §794. With respect to that claim, the Eleventh Amendment prohibits federal courts from entertaining suits by private parties against states and their agencies. *Alabama v. Pugh*, 438 U.S. 781

(1978). Suits against a state brought by its own citizens are included within this prohibition. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1973). Congress may waive this immunity by authorizing suit against the state under a specific statute. However, waiver will be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman* at 673.

Thus, the Court must examine section 794 to determine if there has been a waiver by Congress of the state's Eleventh Amendment immunity. An examination of section 794(a), which was added by amendment in 1978, is also required for the same purpose. That section provides that, "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . under section 794 of this title."

Careful analysis of both sections leads the Court to conclude that there is no evidence of Congressional intent to waive the Eleventh Amendment immunity for suits brought under section 794 or Title VI which is sufficient to meet the standard articulated in *Edelman, supra. Stemple v. Board of Education*, 464 F. Supp. 258, 262 (D.Md. 1979); *Stubbs v. Kline*, 463 F. Supp. 110, 115-16 (W.D.Pa. 1978). There is also no support for plaintiff's contention that the state defendants have consented to being sued in federal court by receiving federal assistance, *Edelman* at 673, or by agreeing to conform to federal law as a condition of the receipt of assistance. Therefore, the Eleventh Amendment operates as a bar to suit against the state agencies on the federal claim.

Defendants have argued as a second ground for dismissal that a suit for employment discrimination under 29 U.S.C. § 794 must allege that the primary objective of the federal assistance received by defendants is to provide employment. Although plaintiff has not so alleged, the Court finds this argument unpersuasive. *Hart v. County of Alameda*, 21 Fair Empl. Prac. Cases 234 (N.D.Cal. 1979).

With respect to the claims under state law, the same analysis must be applied as in the case of the federal claim *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573 (1946). There is no evidence before this court that the state has consented to suit against it in the federal court for violation of California Labor Code § 1420 or for California Government Code § 11135. The state may consent to suit in its own courts without consenting to suit against it in the federal courts. *Kennecott*, supra. In the opinion of this Court, the Eleventh Amendment bars the pendent state claims which also must be dismissed. Alternatively, having decided that the federal claim must be dismissed, the Court exercises its discretion to dismiss the pendent claims. *United Mineworkers v. Gibbs*, 383 U.S. 715 (1966). Accordingly, for the reasons stated above,

IT IS ORDERED that defendants' motion to dismiss the complaint is granted.

DATED: *January 30, 1980*

Mariana R. Pfaeizer

Mariana R. Pfaeizer
United States District Judge

AUG. - 9 1984

PHILLIP B. WINBERRY
CLERK U.S. COURT OF APPEALS**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DOUGLAS JAMES SCANLON,)

Plaintiff-Appellant,)

vs.)

No. 80-5201

ATASCADERO STATE HOSPITAL)

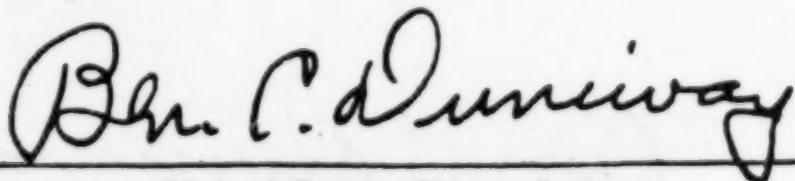
and CALIFORNIA DEPARTMENT)

OF HEALTH,)

Defendants-Appellees.)

O R D E R

The motion of defendants-appellees Atascadero State Hospital and California Department of Mental Health for stay of the mandate in this matter, pending application to the Supreme Court of the United States for a writ of certiorari, is hereby granted, and issuance of the mandate is stayed for a period of thirty days from and after August 4, 1984. If within that period there is filed with the Clerk of this court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari has been filed and that the case has been docketed in the Supreme Court, the stay granted by this order shall continue until final disposition of the case by the Supreme Court.



United States Circuit Judge

FILED

JUL 11 1984

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DOUGLAS JAMES SCANLON,)

Plaintiff-Appellant,)

v.)

No. 80-5201

ATASCADERO STATE HOSPITAL)

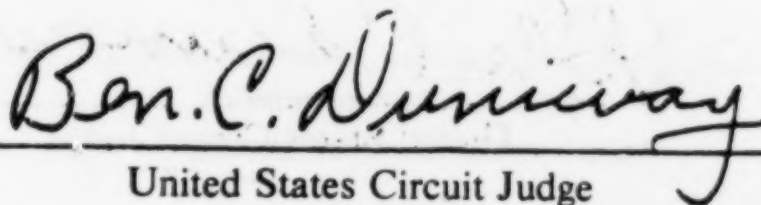
and CALIFORNIA DEPARTMENT)

OF MENTAL HEALTH,)

Defendants-Appellees.)

ORDER

The motion of defendants-appellees Atascadero State Hospital and California Department of Mental Health for stay of the mandate in this matter, pending application to the Supreme Court of the United States for a writ of certiorari, is hereby granted, and issuance of the mandate is stayed for a period of thirty days from and after July 5, 1984. If within that period there is filed with the Clerk of this court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari has been filed and that the case has been docketed in the Supreme Court, the stay granted by this order shall continue until final disposition of the case by the Supreme Court.


United States Circuit Judge

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 31, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

U. S. SUPREME COURT
1 First Street, N.E.
Washington, D.C. 20543
(Delivered: Original & 40 copies)

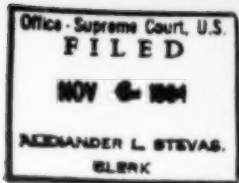
MARILYN HOLLE
Protection & Advocacy Inc.
1636 W. 8th Street
Suite 211
Los Angeles, California 90017

DANIEL BRZOVIC
Western Law Center for the
Handicapped
849 South Broadway, Suite M-22
Los Angeles, California 90014

MARY-LYNNE FISHER
Loyola Law Clinics
1441 West Olympic Boulevard
P.O. Box 15019
Los Angeles, California 90015-3980

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 31, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

(9)
No. 84-351

ATASCADERO STATE HOSPITAL and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH, petitioners,
v.
DOUGLAS JAMES SCANLON, respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Joseph Lawrence
Marilyn Holle*
WESTERN LAW CENTER
FOR THE HANDICAPPED
AT LOYOLA LAW SCHOOL
1441 West Olympic Blvd.
P.O. Box 15019
Los Angeles, Calif. 90015
(213) 736-1031

Mary-Lynne Fisher
Loyola Law School
1441 West Olympic Blvd.
P. O. Box 15012
Los Angeles, Calif. 90015

Attorneys for Petitioner

*counsel of record

2388

COUNTER-STATEMENT OF
QUESTIONS PRESENTED

1. Do Sections 504 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 794 and 794a, which authorize suit and the award of monetary and equitable relief as well as the award of attorney's fees to a prevailing party against any recipient of federal financial assistance by any person aggrieved by the acts or omissions of such recipient, and which require remedial action for the violation of Section 504's terms, abrogate the State of California's Eleventh Amendment immunity when California, as one of the principal intended recipients of federal financial assistance, violates the Act?

2. Has the State of California consented to be sued and waived its Eleventh Amendment immunity through receipt of federal financial assistance with assurances that it will obey the commands of the Rehabilitation Act and that it will take corrective remedial action for past violations of the Act?

3. Does the Eleventh Amendment operate as a bar to the Rehabilitation Act when the Rehabilitation Act was enacted pursuant to Section 5 of the Fourteenth Amendment and Article 1, Section 8 of the United States Constitution?

4. Should the decision in Hans v. Louisiana, 134 U.S. 1 (1890), be overruled? At the very least, should the decision in Edelman v. Jordan, 415 U.S. 651 (1974), be overruled?

TABLE OF CONTENTS

Counter-Statement of Questions Presented.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Opinions Below.....	1
Additional Constitutional Provisions.....	2
Statement of Case.....	2
Reasons for denying the writ:	
I. The decision of the Court of Appeals does not warrant review by this court as a matter of significant public importance.....	4
A. The only pleadings filed to date are the complaint and a motion to dismiss. Critical discovery that may avoid the necessity for constitutional adjudication is yet to occur.....	5
B. The decision of the Court of Appeals is correct. Through the Rehabilitation Act of 1973, as amended, Congress abrogated California's Eleventh Amendment immunity. Moreover, California has consented to be sued and has waived any Eleventh Amendment shield it may have had.....	7
II. Should this Court accept the petition for writ of certiorari, it should consider overruling the decision in <u>Hans v. Louisiana</u> . At the very least, the decision in <u>Edelman v. Jordan</u> should be overruled.....	14
Conclusion.....	17

TABLE OF AUTHORITIES

Cases

<u>Alexander v. Choate, sub nom. Jennings v. Alexander,</u> 715 F.2d 1036 (6th Cir. 1983), <u>cert.</u> <u>granted</u> 79 L.Ed.2d 677 (1983).....	6
<u>Consolidated Rail Corp. v. Darrone, _____ U.S.</u> <u>_____</u> , 104 S.Ct. 1248 (1984).....	4, 6, 12
<u>Edelman v. Jordan</u> , 415 U.S. 651 (1974).....	i, 11, 12, 13, 15, 16
<u>Employees v. Missouri Public Health</u> <u>Dep't</u> , 411 U.S. 279 (1973).....	13
<u>Fitzpatrick v. Bitzer</u> , 427 U.S. 445 (1976).....	13
<u>Florida Dep't of Health v. Florida Nursing</u> <u>Homes Ass'n</u> , 450 U.S. 147 (1981).....	12
<u>Grove City College v. Bell, _____ U.S. _____</u> , 104 S.Ct. 1211 (1984).....	6
<u>Guardians Ass'n v. Civil Service Comm'n of the</u> <u>City of New York, _____ U.S. _____</u> , 103 S.Ct. 3221 (1983).....	6
<u>Hans v. Louisiana</u> , 134 U.S. 1 (1890).....	i, 14, 15
<u>Hutto v. Finney</u> , 437 U.S. 678 (1978).....	10, 11
<u>Monell v. New York City Dep't of Social</u> <u>Services</u> , 436 U.S. 658 (1978).....	14
<u>Quern v. Jordan</u> , 440 U.S. 332 (1979).....	12, 13, 16
<u>Scanlon v. Atascadero State Hospital</u> , 677 F.2d 1271 (1982), <u>vac'd and remanded</u> , 104 S.Ct. 1583 (1984).....	1, 3, 4
<u>Scanlon v. Atascadero State Hospital</u> , 735 F.2d 359 (9th Cir. 1984).....	1, 11
<u>Southeastern Community College v. Davis</u> , 442 U.S. 397 (1979).....	6, 8

Constitutional Provisions

The Eleventh Amendment.....	<u>passim</u>
The Fourteenth Amendment.....	1, 2, 12, 15, 16
The Spending Clause, Article 1, Section 8, Clause 1.....	1, 2, 12, 15

Statutes

Civil Rights Act of 1871, 42 U.S.C. § 1983.....	13, 16
Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988.....	10
The Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701 <u>et seq.</u>	5, 10
Section 504, 29 U.S.C. § 794.....	3, 4, 5
Section 505, 29 U.S.C. § 794a.....	10, 13
Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d <u>et seq.</u>	11
Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 16781 <u>et seq.</u>	5

Regulations

45 C.F.R. § 84.2(f).....	10
45 C.F.R. § 84.5.....	11
45 C.F.R. § 84.6.....	11
45 C.F.R. § 84, App. 1 ¶8.....	11
45 C.F.R. § 84, App. 1 ¶9.....	11

Legislative History

124 Cong. Rec. 30346-49 (Sept. 20, 1978).....	10, 13
<u>Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the House Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess. 73, 76 (1977).....</u>	11
1974 U.S. Code, Cong. & Admin. News, pp. 6390-6391.....	8

Other Authorities

Field, <u>The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States</u> , 126 U. Pa. L. Rev. 1203 (1978).....	14
Gibbons, <u>The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation</u> , 83 Col. L. Rev. 1889 (1983).....	14
Jacobs, <u>The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One</u> , 126 U. Pa. L. Rev. 515 (1978).....	14

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 84-351

ATASCADERO STATE HOSPITAL and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH, Petitioners,

v.

DOUGLAS JAMES SCANLON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Douglas James Scanlon opposes the petition for writ of certiorari filed by Atascadero State Hospital and the California Department of Mental Health. The petition should be denied inasmuch as the constitutional issues presented are premature, can be framed more concretely, or avoided entirely through further litigation in this matter. The decision of the Court of Appeals is correct making review of this matter not significant.

OPINIONS BELOW

The opinion of the Court of Appeal for the Ninth Circuit is reported at 735 F.2d 359. Prior decisions of the Ninth Circuit and this Court in this action can be found at 677 F.2d 1271, vac'd and remanded, 104 S.Ct. 1583 (1984).

ADDITIONAL CONSTITUTIONAL PROVISIONS

1. The Fourteenth Amendment to the United States Constitution in relevant part provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. Article 1, Section 8, Clause 1 of the United States Constitution provides:

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

STATEMENT OF CASE

Respondent Douglas James Scanlon has diabetes mellitus which caused loss of vision in one eye. During the Spring of 1977, while Scanlon was a graduate student at California Polytechnic Institute at San Luis Obispo, Scanlon applied for a position at Atascadero State Hospital as a graduate student assistant. Scanlon was offered the position subject to passing a pre-employment physical which he failed solely by reason of his handicaps -- namely, diabetes and loss of vision in one eye. As a result of failing the physical, Scanlon was denied the position.

Atascadero State Hospital and the California State Department of Mental Health, the state agency responsible for administering and supervising Atascadero, are recipients of federal financial assistance. Prior to commencing this action in November of 1979, Scanlon filed an administrative complaint with the then U.S. Department of Health, Education and Welfare (HEW). In May of 1979, HEW determined that the petitioners had discriminated against Scanlon solely by reason of his handicap.

After suit was commenced, petitioners moved to dismiss the complaint on two grounds. First, they contended that § 504 of the Rehabilitation Act did not protect a qualified handicapped person against employment discrimination unless the Federal assistance was received for the purpose of providing employment. Second, the petitioners argued that Mr. Scanlon's suit under § 504 was barred by the Eleventh Amendment to the United States Constitution.

The District Court rejected petitioners' interpretation of § 504, namely that federal financial assistance had to be received for employment purposes before a claim of employment discrimination could be made out. Nonetheless, the District Court granted the petitioners' motion to dismiss the § 504 action and pendant state claims on the ground that the entire action was barred by the Eleventh Amendment.

In a divided opinion the Court of Appeals for the Ninth Circuit summarily affirmed. Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (1982). However, the majority did not reach the Eleventh Amendment issue, but rather affirmed the dismissal on the ground that a private action

under § 504 to redress employment discrimination cannot be maintained unless a primary objective of the federal assistance is to provide employment.

Scanlon filed a petition for writ of certiorari with this Court which this Court granted, then vacated the decision of the Court of Appeals and remanded. ____ U.S. ____, 104 S.Ct. 1583 (1984). Following remand, the Court of Appeal reconsidered its decision in light of Consolidated Rail Corp. v. Darrone, ____ U.S. ____, 104 S.Ct. 1248 (1984), and reversed the decision of the District Court. The Court of Appeals concluded that under Darrone, handicapped persons denied employment can sue recipients of federal financial assistance regardless of whether the recipients received federal financial assistance for the purpose of employment. The Court of Appeals also concluded that the Rehabilitation Act of 1973, as amended, abrogated the State of California's Eleventh Amendment immunity, that the state had consented to be sued and waived its immunity. This writ concerns solely that part of the Court of Appeals' decision that touches upon the Eleventh Amendment.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS
DOES NOT WARRANT REVIEW BY THIS COURT AS A
MATTER OF SIGNIFICANT PUBLIC IMPORTANCE.

In its effort to have the Court prematurely adjudicate constitutional issues, petitioners ignore that the interlocutory ruling of the Court of Appeals has created no liability against the State and has established no enforceable rights against it. Rather, the ruling has

merely allowed the litigation to proceed in its normal course. The ruling creates no guarantee that respondent will prevail or that he will be awarded monetary or equitable relief against California. It goes without saying that the Court avoids unnecessary and premature constitutional decision making. This is particularly true where an act of Congress is called into question. This lawsuit should be no exception to this rule. The posture of this litigation reveals that it is not yet mature for adjudication of the Eleventh Amendment issue and that maturation of the record will enhance the ability of the Court to render a sound decision should one prove necessary.

- A. The only pleadings filed to date are the complaint and a motion to dismiss. Critical discovery that may avoid the necessity for constitutional adjudication is yet to occur.

The record is silent as to the amount of federal financial assistance petitioners receive and which programs and activities of petitioners receive such assistance. These as of yet unanswered questions may prove to be critical inquiries before liability can be imposed under the Rehabilitation Act of 1973, 29 U.S.C. § 794, for it may be that no relevant program or activity of petitioners receives federal financial assistance. Recently, under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 16781 et seq., which is similar in language to the Rehabilitation Act of 1973, 29 U.S.C. § 794, here at issue, this Court held that Title IX's nondiscrimination proscriptions do not operate against an entire institution if only a discrete program or activity of the institution received federal

financial assistance. Grove City College v. Bell, ____ U.S. ____, 104 S.Ct. 1211 (1984). At present it is unclear whether this reasoning applies to the Rehabilitation Act. Consolidated Rail Corp. v. Darrone, ____ U.S. ____, 104 S.Ct. 1248, 1256 (1984). Should future litigation conclude that the reasoning of Grove City College applies to the Rehabilitation Act and should it develop that Scanlon was not discriminated against in any relevant program or activity to which the nondiscrimination proscriptions of the Act apply, then no liability against the State will be established in this litigation. Thus potentially unnecessary constitutional decision making can be avoided if the litigation is allowed to follow its normal course and if the development of the law is allowed to unfold.

In like fashion, the record is silent as to whether Scanlon is "otherwise qualified" for the position he applied for, 29 U.S.C. § 794, and whether petitioners would have had to make fundamental alterations in the job to accommodate him. Unless Scanlon overcomes these hurdles he may be entitled to no relief. Southeastern Community College v. Davis, 442 U.S. 397 (1979).

Finally, the record is silent about whether petitioners intentionally discriminated against Scanlon. Since it is not yet clear whether intentional discrimination is required before liability under the Rehabilitation Act can be established, it is premature for the Court to rush into constitutional adjudication when liability has not yet been established and may not be. Compare, Consolidated Rail Corp. v. Darrone, supra, with Guardians Ass'n v. Civil Service Comm'n of the City of N.Y., ____ U.S. ____, 103 S.Ct. 3221 (1983); see, also, Alexander v. Choate, sub nom.

Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983), cert. granted, 79 L.Ed. 2d 677 (1983) [argued October 1, 1984].

The ruling below creates no actual liability against California. Nor does the ruling guarantee that Scanlon will prevail. This Court should allow the litigation to continue its normal course. By following such a path the Court will allow the record to be clarified and the Court will allow the jurisprudence of the Rehabilitation Act to develop fully. By following such a path, this Court can potentially avoid unnecessary constitutional decision making.

B. The decision of the Court of Appeals is correct. Through the Rehabilitation Act of 1973, as amended, Congress abrogated California's Eleventh Amendment immunity. Moreover, California has consented to be sued and has waived any Eleventh Amendment shield it may have had.

The Court of Appeals is correct that in enacting the Rehabilitation Act Congress abrogated California's Eleventh Amendment immunity. Undeniably any disabled person aggrieved by an act of discrimination solely by reason of his handicap can sue any recipient of federal financial assistance, including a state. The position advanced by California is not only wrong but it places California at war with itself and with Congress.

Until this litigation California advocated that the Rehabilitation Act allowed the victims of handicap

discrimination to sue states and their agencies. In South-eastern Community College v. Davis, 442 U.S. 397 (1979), the State of California filed the only state brief in support of Davis' right to sue a state operated college. California's amicus curiae brief in Davis forthrightly states that:

It is clear that a private right of action under Section 504 has always been contemplated by Congress.

Brief of California as Amicus Curiae in Southeastern Community College v. Davis, at 18.

California's Davis brief looked to the legislative history of the Rehabilitation Act to reach its conclusion. The brief quoted from the Senate Report on the 1974 amendments to the Act which stated:

This approach to implementation of Section 504, which closely follows the models of the above cited anti-discrimination provisions, [Title VI] would ensure administrative due process ... as well as relative ease in implementation, and permit a judicial remedy through a private action.

Id. at 20-21 (emphasis added by California) quoting from 1974 U.S. Code, Cong. & Admin. News, at pp. 6390-6391.

In arguing for a private right to sue a state, California noted:

The 95th Congress has further strengthened the right to a private judicial remedy under Section 504 and continued to act in a manner consistent with the above quoted remarks. The 1978 amendments to the Act, especially the addition of Section 505(b) which empowers the courts to ... allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs ... can only be read to mean that implicit within Section 504 is the right of an aggrieved person to seek judicial redress.

Ibid. at 21.

Admittedly, Davis did not deal directly with the Eleventh Amendment immunity of Southeastern Community

College. However, it could not have escaped California's attention that the college was a state institution run by North Carolina and that by urging that Davis be allowed to sue the college, California was unequivocally recognizing that the Eleventh Amendment did not act as a bar to suits brought to enforce the Rehabilitation Act. If an aggrieved handicapped person can sue the State of North Carolina, why can't an aggrieved California resident sue California, particularly where, as here, the U.S. Department of Health, Education and Welfare (now the United States Department of Health and Human Services) has found that California impermissibly discriminated against Scanlon solely by reason of his handicap? Nothing in the petition of California comes close to answering this stunning anomaly.

The conclusion reached by California in its Davis brief is unquestionably correct. When Congress amended the Rehabilitation Act in 1978 to add attorneys fees to the remedies available to prevailing parties, it squarely focused on the Eleventh Amendment immunity of the states. Senator Alan Cranston, ironically also from California, was one of the chief sponsors of the amendments. Senator Cranston stated:

I emphasize that it is intended that interpretation of the attorney's fees provision in the committee bill be analogous to interpretations of the Civil Rights Attorney's Fees Act of 1976, Public Law 904-556. The legislative history and expressions of legislative intent with respect to Public Law 94-556 are applicable to the new section 505(b). Thus, for example, the discussion of "prevailing party" and "reasonable fees" found in the Senate committee report to accompany H.R. 15460 (H.Rept. No. 94-1558), in particular pages 6 to 9, would be applicable whenever there is judicial consideration of the handicapped attorney's fees provision contained in proposed section 505(b).

Mr. President, there are a number of points I would like to highlight. I stress that I raise these particular points solely for the

purpose of highlighting them and in no way intend to imply that other pertinent points not mentioned are not applicable.

* * *

Third, with respect to State and local bodies or State and local officials, attorney's fees, similar to other items of cost, would be collected from the official, in his official capacity from funds of his or her agency or under his or her control; or from the State or local government -- regardless of whether such agency or Government is a named party. The authorization of attorney's fees under proposed section 505(b) in cases brought to Congress under among other things, section 5 of the 14th amendment. Thus, in accordance with the Supreme Court's decision in Hutto v. Finney, No. 77-1660, June 23, 1978, the 11th amendment is no bar to the recovery of attorney's fees under proposed section 505(b) from State government as a result of an action or proceeding to enforce or change a violation under title V of the Rehabilitation Act of 1973.

Fourth, proposed section 505(b) is intended to apply to all cases pending on the date of enactment of the provision.

124 Cong. Rec. 30346-47 (remarks of Sen. Cranston, Sept. 20, 1978) (emphasis added).

Senator Cranston's reliance on Hutto v. Finney, 437 U.S. 678 (1978), bears note. In Hutto v. Finney, the Court looked to language virtually identical to that of Section 505 but contained in the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, and to the almost identical Congressional statements to find that the Eleventh Amendment had been abrogated by Congress.

The Rehabilitation Act is a particularly strong Act to find congressional abrogation of the Eleventh Amendment. States are the prime recipients of federal financial assistance to which the Act applies. They are included within the definition of recipients. 45 C.F.R. § 84.2(f). Section 505 of the Act, 29 U.S.C. § 794a, not only allows for attorney's fees to be awarded "in any action" to enforce

the Act, but it also makes available to any person the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq., in any action brought to enforce the Act. The language of the Act is unequivocal and contemplates no exception. Hutto v. Finney, supra, 437 U.S. at 693-94. As the Court of Appeal correctly noted quoting from Edelman v. Jordan, 415 U.S. 651, 672 (1974), the Rehabilitation Act is a "congressional enactment [that] ... by its very terms authorize[s] suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities." Scanlon v. Atascadero State Hospital, 735 F.2d 359, 361 (9th Cir. 1984).

Regulations that implement the Rehabilitation Act are consistent with the conclusion that states by accepting federal financial assistance consent to suit and agree to waive their Eleventh Amendment immunity. Regulations issued by HEW require states to assure that they will obey the Rehabilitation Act. 45 C.F.R. § 84.5. The regulations do not stop at mere assurances. They require states to take remedial action to overcome past acts of discrimination. 45 C.F.R. § 84.6; see, also, 45 C.F.R. § 84, App. 1 ¶ 9 (analysis of remedial action regulation). Even prior to the strengthening of the Act through section 505, the regulations noted that it was likely that recipients of federal financial assistance could be sued through a private action. 45 C.F.R. § 84, App. 1 ¶ 8 (analysis of private right of action).

These regulations and analyses were before Congress prior to when the Rehabilitation Act was strengthened to increase its remedies and to provide for attorneys fees to be paid to the victims of discrimination. Implementation

of Section 504, Rehabilitation Act of 1973: Hearings Before the House Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess. 73, 76 (1977).

When read together these regulations, which warrant considerable deference because they were issued after consultation with the Congress, Consolidated Rail Corp. v. Darrone, supra, 104 S.Ct at 1255, establish that all recipients, states included, make themselves fully accountable to the victims of discrimination when they receive federal financial assistance and that by agreeing to the receipt of such assistance all recipients agree to be bound without limitation to remedy their discriminatory acts or omissions.

The decisions cited by California in support of its petition do not change the result. Edelman v. Jordan, supra, itself recognizes that federal statutes do not always have to state expressly that the Eleventh Amendment is waived. As California's amicus curiae brief in Davis illustrates, the Rehabilitation Act breathes right of private enforcement against the states at every relevant passage. Moreover, Edelman, Quern v. Jordan, 440 U.S. 332 (1979), and Florida Dep't of Health v. Florida Nursing Homes Ass'n, 450 U.S. 147 (1981), all involved laws passed exclusively pursuant to Article 1, Section 8 of the United States Constitution (spending clause). The Rehabilitation Act was passed pursuant to the Fourteenth Amendment as well as the Spending Clause. This Court has recognized that the Fourteenth Amendment to the United States Constitution has eroded Eleventh Amendment immunity and that laws passed pursuant to Section 5 of the Fourteenth Amendment survive

Eleventh Amendment challenges. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Additionally, in the Edelman line of cases cited by California, Congress did not provide expressly or impliedly for private enforcement of the Acts involved, leaving the Court to decide whether the Civil Rights Act of 1871, 42 U.S.C. § 1983, abrogated Eleventh Amendment immunity. See, e.g., Quern v. Jordan, *supra*, 440 U.S. at 342-44. In contrast, as California noted in its Davis amicus curiae brief, the Rehabilitation Act expressly contemplates private enforcement as is clear from the language of Section 505, 29 U.S.C. § 794a, and its relevant congressional history.

Finally, the holding in Employees v. Missouri Public Health Dep't, 411 U.S. 279 (1973), a pre-Edelman decision, does not counsel a different result. Unlike Employees, where there was no Congressional history concerning the waiver of Eleventh Amendment immunity, 411 U.S. at 285, here there is such a history. 124 Cong. Rec. 30346-30349 (Remarks of Sen. Cranston and Bayh, September 20, 1978).

Only by ignoring its own prior conclusions about the Rehabilitation Act as well as the language, structure, purpose and legislative history of the Act, does California challenge the decision of the Court of Appeals. Unquestionably the decision of the Court of Appeals is correct. The decision does not warrant review by this Court.

II.

SHOULD THIS COURT ACCEPT THE PETITION
FOR WRIT OF CERTIORARI, IT SHOULD CONSIDER
OVERRULING THE DECISION IN HANS V. LOUISIANA.

AT THE VERY LEAST, THE DECISION IN
EDELMAN V. JORDAN SHOULD BE OVERTURNED.

In recent years considerable attention has been focused on the meaning of the Eleventh Amendment. Since Hans v. Louisiana, 134 U.S. 1 (1890), this Court has concluded that despite the Amendment's otherwise unambiguous language, the Eleventh Amendment bars all suits in federal court whether filed by a citizen against another state or against his own state. However, time has not stood still. Persuasive scholarship now casts doubt on the soundness of the ruling in Hans v. Louisiana. See, generally, Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Col. L. Rev. 1889 (1983) (hereinafter Eleventh Amendment: Reinterpretation); Jacobs, The Eleventh Amendment and Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515 (1978); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203 (1978). As detailed by Judge Gibbons in Eleventh Amendment: Reinterpretation, and by the other scholars, the reason for the Eleventh Amendment, its wording and structure as well as contemporaneous judicial interpretation, all lead to the conclusion that Hans v. Louisiana was wrongly decided.

Respondent does not lightly request this Court to overrule Hans v. Louisiana. A decision whose life has been sustained for so long a time should not be cast aside capriciously. However, neither should it be falsely revered. As this Court indicated in Monell v. New York City

Dept. of Social Services, 436 U.S. 658, 695-701 (1978), when historical research reveals that decisions of the Court are wrong, the Court should forthrightly admit the mistake and correct the error.

As the volume of cases that invoke the Hans holding grows, so does confusion as to the fundamental meaning and requirements of the Eleventh Amendment. Hans v. Louisiana establishes a rule of legislative enactment that unduly protects the states while unnecessarily infringing upon the right of the people to hold states accountable for their discriminatory acts and the power of the Congress to legislate pursuant to Article 1, Section 8, and to the Fourteenth Amendment. Hans fails to come to grips with the fundamental alteration of states' rights wrought by the Fourteenth Amendment.

Regardless of whether the policy espoused in Hans v. Louisiana is defensible in abstract theory, the policy needs to be grounded in a sound and constitutionally valid interpretation of the Eleventh Amendment that does not do violence to the logical commands of the Amendment, the reasons why it was passed, and the history of the Fourteenth Amendment. Hans does such violence.

For like reasons the Court should overrule Edelman v. Jordan. Edelman rests on a foundation laid by Hans v. Louisiana that cannot withstand historical scrutiny. Central to the holding in Edelman was the conclusion that laws passed to enforce the Fourteenth Amendment specifically had to mention that they overruled Eleventh Amendment immunity, that the Fourteenth Amendment did not remove such immunity by its own force, and that since the Congressional debates that surrounded the passage of such historic civil

rights laws as the Civil Rights Act of 1871, 42 U.S.C. § 1983, failed to mention abrogation of Eleventh Amendment immunity, the immunity was not diminished. Quern v. Jordan, 440 U.S. 332, 342-344 (1979). This rationale fails at several key junctures. If the common, mid-Nineteenth Century understanding of the Eleventh Amendment was not as Edelman states, but rather, if it were more in line with the express language of the Amendment as scholars now agree, then Congressional failure in 1871 to mention abrogation of immunity during civil rights debates becomes insignificant. Likewise, if the Fourteenth Amendment was thought to fundamentally realign and curtail states' rights, including immunity if any existed, then laws passed pursuant to its Section 5 would not need to invoke talismanic phrases of abrogation. The Fourteenth Amendment had already performed the task.

Edelman v. Jordan and its progeny serve to erode impermissably the Fourteenth Amendment. They unduly restrict the people and the Congress and impose artificial hurdles to statutes geared to further civil rights. Edelman should be overruled.

CONCLUSION

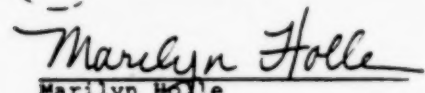
For the foregoing reasons the Court should deny the petition for writ of certiorari filed by the State of California.

Dated: November 2, 1984

Respectfully submitted,

WESTERN LAW CENTER FOR
THE HANDICAPPED
AT LOYOLA LAW SCHOOL


Joseph Lawrence


Marilyn Helle

Attorneys for Respondent

Respondent gratefully acknowledges the assistance of Sang Hyun Kang, Sung Y. Kim, Jeffrey LeBeau, Stephen Olsen, and Robert Olson, law students at Loyola Law School, Los Angeles, California, in helping to prepare this brief in opposition to the petition for writ of certiorari.

CERTIFICATE OF SERVICE
PURSUANT TO SUPREME COURT RULE 28.5(b)

I am a member of the Bar of the United States Supreme Court, am one of the attorneys representing Douglas James Scanlon, the respondent in Docket No. 84-351, and I am filing a notice of appearance in this matter in connection with respondent's opposition to the petition for writ of certiorari.

I served the petitioner herein by placing the following in a United States mail box, with first-class postage prepaid, the following documents:

One copy of the application for leave to proceed in forma pauperis with supporting affidavit

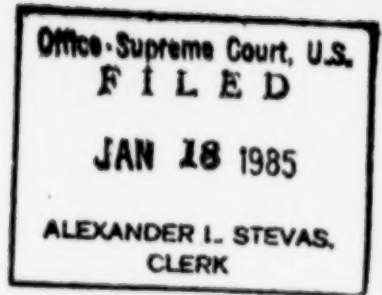
Three copies of respondent's brief in opposition to the petition for certiorari

addressed to counsel of record as follows

James E. Ryan, Esq.
Deputy Attorney General
3580 Wilshire Boulevard, 8th floor
Los Angeles, California 90010

on this third day of November, 1984. I swear under penalty of perjury that the foregoing is true and correct. Executed this third day of November, 1984, in the County of Los Angeles, State of California.

Marilyn Holle
WESTERN LAW CENTER
FOR THE HANDICAPPED
AT LOYOLA LAW SCHOOL
1441 West 8th Street
P.O. Box 15019
Los Angeles, Calif. 90015
(213) 736-1031



No. 84-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

**ATASCADERO STATE HOSPITAL
and CALIFORNIA DEPARTMENT
OF MENTAL HEALTH,**

Petitioners,

vs.

DOUGLAS JAMES SCANLON,
Respondent.

PETITIONERS' BRIEF ON THE MERITS

JOHN K. VAN DE KAMP

Attorney General
of the State of California

THOMAS E. WARRINER

Assistant Attorney General

ANNE S. PRESSMAN

Supervising Deputy Attorney General

JAMES E. RYAN

Deputy Attorney General

Counsel of Record

G. R. OVERTON

Deputy Attorney General

Suite 800, 3580 Wilshire Boulevard
Los Angeles, CA 90010
(213) 736-2279

Attorneys for Petitioners

9

QUESTION PRESENTED

1. Does the doctrine of sovereign immunity as exemplified by the Eleventh Amendment to the United States Constitution bar private actions in federal courts under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) against States and their agencies?

PARTIES TO THE PROCEEDINGS

Petitioners Atascadero State Hospital and California Department of Mental Health are administrative entities under the aegis of the State of California and are defendants in the action below. Respondent is Douglas James Scanlon, an applicant for employment with petitioners and the plaintiff in this case.

TOPICAL INDEX

	<u>Page</u>
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TOPICAL INDEX	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	9
SUMMARY OF ARGUMENT	16
ARGUMENT	21
I THE DOCTRINE OF SOVEREIGN IMMUNITY AS EXEMPLIFIED BY THE ELEVENTH AMENDMENT BARS PRIVATE ACTIONS AGAINST STATES AND THEIR AGENCIES BROUGHT IN FEDERAL DISTRICT COURTS UNDER SECTION 504 OF THE REHABILI- TATION ACT OF 1973	21
A. This Court's Prior Decisions on the Eleventh Amendment Require Express Statutory Abrogation by Congress	21
1. Introduction	21

2. Necessary Conditions for Abrogation or Waiver of Immunity	30
B. The Rehabilitation Act of 1973 and, In Particular, Section 504, Do Not Reflect Any Evidence of Congressional Intent to Abrogate States' Immunity	50
C. The Rehabilitation Act Represents an Exercise by Congress Under Its Spending Power, Not Under Section 5 of the Fourteenth Amendment	67
D. Reference to the Legislative History of the Rehabilitation Act Does Not Reveal Any Congressional Intent to Abrogate States' Immunity	71
II THE RESPONDENT'S SUGGESTION THAT THIS COURT REVERSE LONGSTANDING DECISIONS IS INAPPROPRIATE	78
CONCLUSION	84

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
Alabama v. Pugh (1978) 438 U.S. 781	47
Cannon v. University of Chicago (1979) 441 U.S. 677	27,58
Ciampa v. Massachusetts Rehabilitation Com'n. 718 F.2d 1 (1st Cir. 1983)	55,73
Consolidated Rail Corp. v. Darrone (sub. nom.: Le Strange v. Consolidated Rail Corp. (1984) 13,14,27,28, ____ U.S.____, 104 S.Ct. 1248 51,69	
Cory v. White (1982) 457 U.S. 85	24
Edelman v. Jordan (1974) 415 U.S. 651	passim
EEOC v. Wyoming (1983) 460 U.S. 226	71
Employees v. Missouri Public Health Dept. (1973) 411 U.S. 279	passim
Ex Parte Young (1908) 209 U.S. 123	28

Fitzpatrick v. Bitzer (1976)	
427 U.S. 445	passim
Florida Dept. of Health v.	
Fla. Nursing Home Assn. (1981)	
450 U.S. 147	64
Guardians Ass'n v. Civ. Serv.	
Com'n. of City of N.Y. (1983)	
U.S. _____,	
104 S.Ct. 3221	27,29,70
Hans v. Louisiana (1890)	
134 U.S. 1	23,79,80,81,82
Hendrick Hudson Dist. Bd.	
of Ed. v. Rowley (1982)	
458 U.S. 176	83
Hutto v. Finney (1978)	
437 U.S. 678	passim
Miener v. State of Mo.	
673 F.2d 969 (8th Cir. 1982),	
cert. den. 459 U.S. 909 (1982)	55
Parden v. Terminal R. Co. (1964)	
377 U.S. 184	35
Pennhurst State School v.	
Halderman (1981)	20,22,29,
451 U.S. 1	52,71,83
Pennhurst State School &	
Hosp. v. Halderman (1984)	
U.S. _____,	
104 S.Ct. 900	22,24,28,30,49,79

Petty v. Tennessee-Missouri Com'n. (1959) 359 U.S. 275	35
Quern v. Jordan (1979) 440 U.S. 332	28,47,48, 67,69,78
Rosado v. Wyman (1970) 397 U.S. 397	29
Smith v. Robinson (1984) U.S. _____, 104 S.Ct. 3457	29
Southeastern Community College v. Davis (1979) 442 U.S. 397	27

Statutes

California Government Code:	
§ 12900	29
§ 12926(c)	29
§ 12940	29
§ 12965(b)	29
California Welfare and Institutions Code	
§ 7200	30

Federal Statutes

Civil Rights Act of 1964 Pub.L. 88-352, 78 Stat. 253	39,54
---	-------

Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988	43
Developmentally Disabled Assistance and Bill of Rights Act of 1975, as added, Pub.L. 94-103, 89 Stat. 496, as amended, 42 U.S.C. § 6000	52
Fair Labor Standards Act of 1938 June 25, 1938, c. 676, 52 Stat. 1060 (29 U.S.C. § 201)	57
Medicaid Act, Pub.L. 94-182, § 111, 89 Stat. 1054, 42 U.S.C. § 1396a(g), repealed, Pub.L. 94-552, § 1, 90 Stat. 2540 (1976)	60
Noise Control Act of 1978 Pub.L. 92-574, 86 Stat. 1234 (42 U.S.C. § 49)	61
Rehabilitation Act of 1973 Pub.L. 93-112, 87 Stat. 357 (29 U.S.C. § 701 et seq.)	passim
20 U.S.C. § 1681	27
28 U.S.C. § 1254(1)	3
29 U.S.C. § 721	53
§ 721(c)(1)	53
§ 775(e)	53
§ 792(d)	53

42 U.S.C.	
§ 1988	43
§ 2000d	8,18,25,27
§ 2000e	39, 61
§ 2000e(a)(f)	39
§ 2000e 5(f)(1)	40,61
§ 2000e 5(f)(3)	40,61
§ 6000	53
Vocational Rehabilitation Act	
(former 29 U.S.C. §§ 31-42)	51

Texts

Baker, Federalism and the Eleventh Amendment 48 U. Colo. L.R. 139 (1977)	42
Borchard, Governmental Respon- sibility in Tort, 34 Yale L.J. 1	32
Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suits Upon the States, 126 U. Pa. L.Rev. 1203	42, 82
Gelb and Frankfurt, California Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination, 34 Hast. L.J. 1055 (March- July 1983)	29

Jacobs, The Eleventh Amendment and Sovereign Immunity (Greenwood Press, Inc.; 1972)	82
Nowak, The Scope of Congressional Power to Create Causes of Action Against State Govern- ments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L.Rev. 1413 (1975)	82
Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issued in Controversies about Federalism, 89 Harv. L.Rev. 682 (1978)	82

Constitutions

United States Constitution	
11th Amendment	passim
14th Amendment	passim
Art. I, § 8, cl. 1	67

Miscellaneous

124 Cong. Rec. § 15591 (Sept. 20, 1978)	76
S. Rep. No. 93-318, 93rd Cong. 1st Sess.	51
45 C.F.R.	
§ 84.3(f)	55,56
§ 84.6	55,66

No. 84-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

**ATASCADERO STATE HOSPITAL
and CALIFORNIA DEPARTMENT
OF MENTAL HEALTH,**

Petitioners,

vs.

DOUGLAS JAMES SCANLON,

Respondent.

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit, filed on June 13, 1984, is reported at 735 F.2d 359 and is reprinted at pages A-1 through A-5 of the Appendix to the Petition for Writ of

Certiorari (hereinafter, "Petition"). Prior to that decision, on grounds not related to the question presented herein, this Court on March 19, 1984 granted a petition for writ of certiorari by respondent Scanlon, vacating a prior decision of the Court of Appeals (677 F.2d 1271 (9th Cir. 1982)) and remanding the matter for reconsideration by the appellate tribunal. ____U.S.____, 104 S.Ct. 1583. That Order is reproduced at page A-6 of the Petition. The Court of Appeals' prior Opinion, filed May 24, 1982, is reproduced at pages A-7 through A-21 of the Petition.

The initial Opinion and Order of the United States District Court for the Central District of California dismissing respondent's complaint was

not reported but is set forth at pages A-22 through A-24 of the Petition.

JURISDICTION

The Opinion of the Court of Appeals was entered on June 13, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Petition herein was filed on August 31, 1984 and was granted on November 26, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution,
Amendment XI:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

29 U.S.C. § 794, Pub. L. 93-112, Title V, § 504, September 26, 1973, 87 Stat. 394, as amended Pub. L. 95-602, Title I, §§ 119, 122(d)(2), November 6, 1978, 92 Stat. 2982, 2987:

"Nondiscrimination under federal grants and programs; promulgation of rules and regulations

"No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrim-

ination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such

regulation is so submitted to such committees."

29 U.S.C. § 794a, Pub. L. 93-112, Title V, § 505, as added Pub. L. 95-602, Title I, § 120, November 6, 1978, 92 Stat. 2982:

"Remedies and attorney fees

"(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-16], including the application of sections 706(f) through 706(k) [42 U.S.C.A. § 2000e-5(f) through (k)], shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or

by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accomodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

"(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal

provider of such assistance under section 794 of this title.

"(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

42 U.S.C. § 2000d, Pub. L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252:

"Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

The decision of the Court of Appeals holds that States and their agencies may be sued by private parties in Federal district courts in actions brought pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), notwithstanding the Eleventh Amendment to the United States Constitution and the doctrine of sovereign immunity

embodied therein. The Circuit Court reached this conclusion based solely upon a review of the Rehabilitation Act and the panel's analysis of case law precedent.

Because the proceedings in the District Court terminated by reason of a Motion to Dismiss at the pleading stage, the record is necessarily limited. This action was commenced on November 21, 1979 by respondent Douglas James Scanlon, who alleged that petitioner Atascadero State Hospital (administered by petitioner California Department of Mental Health) in 1978 refused to employ him as a graduate student assistant-recreation therapist solely because of his physical handicap, i.e. diabetes mellitus and lack of vision in one eye. (Joint Appendix, hereinafter

"J.A.," pp. 8-11, ¶¶ 6-11.) Respondent further alleged that State petitioners were recipients of federal financial assistance (J.A., pp. 6-7, ¶¶ 4-5), and that their action violated section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and State fair employment laws. (J.A., pp. 18-21, ¶¶ 26, 30, 34.) Compensatory, injunctive and declaratory relief were sought. (J.A., pp. 21-23.)

Petitioners responded to the complaint by moving to dismiss the action on two grounds: (1) that petitioners were immune from suit in federal court in private actions under section 504 by reason of Eleventh Amendment immunity; and (2) that respondent had failed to allege an essential element for a claim under section 504, to wit, that the federal

assistance allegedly received by petitioners was for the primary purpose of providing employment. (J.A., pp. 47-50.)

The District Court granted petitioners' motion and ordered the action dismissed, holding that the State agencies indeed were protected by the Eleventh Amendment grant of immunity. The court rejected petitioners' second grounds for dismissal. (Petrn., pp. A-22 through A-24.)

The Court of Appeals for the Ninth Circuit, on the other hand, accepted the premise of the aforementioned second grounds and affirmed dismissal on that basis, never reaching the sovereign immunity question. (677 F.2d 1271 (1982); Petn. pp. A-7 through A-21.)

In November 1982, respondent

petitioned this Court for a writ of certiorari, presenting, in essence, the question of whether, in order for a qualified handicapped person to state a viable claim under section 504, the federal financial assistance alleged to have been received by an employer must have been for the primary purpose of providing employment. (U.S. Sup. Ct. Dock. No. 82-5812.)

This same question was presented in a related case, Consolidated Rail Corp. v. Darrone (sub. nom.: Le Strange v. Consolidated Rail Corp.), which this Court subsequently accepted for review. (U.S. Sup. Ct. Dock. No. 82-862.) On February 28, 1984 the Court issued its Opinion in Consolidated Rail Corp., holding that an employer could be sued under section 504 regardless of the

purpose of the federal financial assistance it had received. (___U.S.___, 104 S.Ct. 1248.)

Consequently, on March 19, 1984 this Court granted respondent's petition for writ of certiorari, vacated the Court of Appeals decision and remanded the matter for further consideration in light of the Consolidated Rail Corp. opinion. (___U.S.___, 104 S.Ct. 1583; Petn., p. A-6.)

On remand, the Court of Appeals for the Ninth Circuit noted the Consolidated Rail Corp. decision and found it to be controlling with respect to the issue it had initially determined on appeal in this action. The court then proceeded to address the sovereign immunity question previously not decided on appeal. In an Opinion by the Honorable

Ben C. Duniway, in which the Honorable Warren J. Ferguson and the Honorable Richard B. Kellam (United States District Judge for the Eastern District of Virginia sitting by designation) concurred, the court reversed the District Court and remanded the matter for further proceedings. The court concluded that the Rehabilitation Act of 1973 literally included States as potential defendants in private actions brought by individuals and that petitioners, by allegedly receiving federal funds under said Act, had consented to be sued thereunder. (735 F.2d 359 (1984); Petn., p. A-1.) On August 31, 1984 State petitioners filed their Petition for Writ of Certiorari, which was granted on November 26, 1984. (U.S., 105 S.Ct. 503.)

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals committed error in concluding that Congress abrogated States' sovereign immunity as to private actions brought in federal courts pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and in holding that State petitioners implicitly consented to be sued thereunder by virtue of their participation in and receipt of federal financial assistance under the Act.

The traditional doctrine of sovereign immunity, as constitutionally exemplified in the Eleventh Amendment, has been acknowledged and safeguarded in the decisions of this Court throughout the past century. Pursuant to those decisions the rule has emerged, and has been consistently applied, that States'

immunity to private suit in federal courts will not be declared annulled absent express Congressional intent in the legislation in question and clear evidence that a State has consented to or waived its immunity respecting such actions. (Section I A, infra.)

The adherence to this rule is dictated and justified by traditional concepts of federalism and permits predictability and informed decision-making by all three branches of federal and state governments. Particularly in the context of legislation enacted pursuant to the Spending Clause, the requirements of express abrogation and consent allow States and their agencies to know at the outset that their acceptance of federal assistance, for instance, under a given program may

constitute a waiver of their constitutional immunity. (Section I A, infra.)

The Rehabilitation Act represents typical Spending Clause legislation. (Section I C, infra.) Section 504 (29 U.S.C. § 794) prohibits discrimination against handicapped individuals in any program or activity conducted by a recipient of federal assistance. Section 505(a)(2) (29 U.S.C. § 794a (a)(2)) accords aggrieved individuals the remedies, procedures and rights of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.). Neither Title VI nor the Rehabilitation Act makes any mention of an express private right of action to sue States or their agencies in federal courts. Nor is there any language or scheme elsewhere

in the Act which implies, let alone compels, that States have surrendered or have been divested of their sovereign immunity. (Section I B, infra.)

A conclusion that the Act represents a Congressional effort at overriding the immunity granted States by the Eleventh Amendment runs counter to this Court's decisions, even if one accepts the argument that Congress' source of power at issue here is the enforcement clause of the Fourteenth Amendment. Not only is the Act itself silent with respect to an attempted abrogation of sovereign immunity, its legislative history is indicative of a contrary Congressional understanding. (Section I D, infra.)

Congress knows how and indeed in other circumstances has explicitly expressed in statutory language its

intent to abolish States' immunity. If it intends to condition the grant of financial assistance upon States' waiver of their constitutional immunity, it should not be left to the Judicial and Executive branches or State recipients to divine whether such an intent exists and whether a waiver has or will attach. (Pennhurst I, infra, 451 U.S. 1, 17-18 (1981).) (Section II, infra.)

The Ninth Circuit's analysis and treatment of this Court's decisions on both abrogation and consent (waiver) are erroneous, particularly as applied to the Rehabilitation Act, and its decision below should be reversed.

ARGUMENT

I

**THE DOCTRINE OF SOVEREIGN
IMMUNITY AS EXEMPLIFIED BY THE
ELEVENTH AMENDMENT BARS PRIVATE
ACTIONS AGAINST STATES AND THEIR
AGENCIES BROUGHT IN FEDERAL
DISTRICT COURTS UNDER SECTION 504
OF THE REHABILITATION ACT OF 1973**

**A. This Court's Prior Decisions
on the Eleventh Amendment
Require Express Statutory
Abrogation by Congress**

1. Introduction

The Eleventh Amendment provides:

"The Judicial power of the
United States shall not be
construed to extend to any suit
in law or equity, commenced or
prosecuted against one of the
United States by Citizens of
another State, or by Citizens or
Subjects of any Foreign State."

The principle embodied in the

Amendment gives constitutional¹ status to the doctrine of sovereign immunity, a concept reaffirmed last term in Pennhurst State School & Hosp. v. Halderman, ____ U.S. ____, 104 S.Ct. 900, 907 (1984) (hereinafter, "Pennhurst II"):

"'That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by

1/ See, also, Edelman v. Jordan, 415 U.S. 651, 666 (1974): " . . . [T]he important constitutional principle embodied in the Eleventh Amendment."

private parties against a State
without consent given: not one
brought by citizens of another
State, or by citizens or subjects
of a foreign State, because of
the Eleventh Amendment; and not
even one brought by its own
citizens,² because of the
fundamental rule of which the
Amendment is but an exemplifi-
cation.'" (Quoting from Ex Parte
State of New York No. 1, 256 U.S.
490, 497. (1921).) (Footnote
added.)

The passage quoted above from the

2/ For nearly a century, since its
decision in Hans v. Louisiana, 134 U.S.
1 (1890), the Court has adhered to the
tenet that, notwithstanding the literal
language of the Eleventh Amendment,
suits against States brought by their
own citizens are encompassed within the
Amendment's proscription.

Pennhurst II opinion represents but the latest instance of the Court verifying the strength and scope of the absolute bar posed by the Eleventh Amendment. This principle was previously enunciated in Employees v. Missouri Public Health Dept., 411 U.S. 279, 284 (1973):

"The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State."

The bar of sovereign immunity applies, as to States and State agencies, irrespective of the nature of the relief sought, whether in law or in equity. Pennhurst II, supra, 104 S.Ct. at p. 908; Cory v. White, 457 U.S. 85, 90-91 (1982).

The issue presented in the instant case is whether, under any of the principles or tests employed by this Court in its prior analyses of the Eleventh Amendment's breadth, private Federal court actions under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794; hereinafter, "Act")³ avoid

3/ The Act and its various provisions are discussed more fully in section B, infra, of this brief. The crucial portions for this part of the argument, however, are:

29 U.S.C. § 794, which provides:

"No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance "

and

29 U.S.C. § 794a(a)(2), which reads:

"The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved by any act or
(continued)

the bar of immunity.

In its brief opinion the Court of Appeals gave little more than passing acknowledgment to the status accorded States' sovereign immunity, except to declare it swept away by a statutory scheme which contains no hint of a Congressional effort at lifting that immunity. Notwithstanding the doctrine's constitutional stature and the deference accorded it in recent decisions of this Court, the Ninth Circuit found it a remarkably facile task to introduce the State of California to a federal forum for lawsuits brought by the handicapped under section 504.

failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."

It is not the position of these State petitioners that handicapped individuals should not have or do not have available to them civil remedies to correct discriminatory practices.⁴ Suit in state court under section 504 looms as the most obvious. Adjudication of federal claims in a state forum is not uncommon and whatever policy reasons may

4/ State petitioners have not asserted that an implied private right of action does not exist as to a § 504 claim. There is virtual unanimity in the Circuit Courts that such a remedy exists and all indications from this Court suggest that conclusion. See, Consolidated Rail Corp. v. Darrone, U.S., 104 S.Ct. 1248, 1252 (1984); South-eastern Community College v. Davis, 442 U.S. 397 (1979). See, also, Guardians Ass'n v. Civ. Serv. Com'n. of City of N.Y., U.S., 104 S.Ct. 3221 (1983) (implied right of action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.) and Cannon v. University of Chicago, 441 U.S. 677 (1979) (implied right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681).

be offered against such practice, they do not override the constitutional limitation on the authority of the federal judiciary to entertain suits against States. (Pennhurst II, supra, 104 S.Ct. at pp. 919-920.)

Furthermore, respondent elected not to name as defendants below any state officials, thereby forfeiting the opportunity, at least, of arguing that district court jurisdiction attached under the rule of Ex Parte Young, 209 U.S. 123 (1908). See, e.g., Quern v. Jordan, 440 U.S. 332, 345 (1979).⁵

5/ Whether suit had been instituted under § 504 in state court or against state officials in district court, the extent of available remedies would still need to be addressed in such actions. Although this Court in Consolidated Rail Corp. v. Darrone, supra, 104 S.Ct. at pp. 1252-1253, authorized compensatory backpay under § 505(a)(2) for intentional discrimination, it did not do so (continued)

Moreover, California law provides independent State remedies for handicapped individuals who allege discriminatory employment practices.⁶

in the context of a suit against State defendants. Plaintiffs bringing § 504 actions against a State or its officials may well be limited to injunctive and declaratory relief. (Cf., Pennhurst State School v. Halderman, 451 U.S. 1, 29-30 (1981) (hereinafter "Pennhurst I"); Guardians Ass'n. v. Civ. Serv. Com'n. of City of N.Y., supra, 103 S.Ct. 3221, 3234-3235 (1983); Rosado v. Wyman, 397 U.S. 397, 420-421 (1970). But, compare, Smith v. Robinson, U.S. —, 104 S.Ct. 3457, 3473, n. 24 (1984).

6/ California Government Code § 12900 et seq. ["California Fair Employment and Housing Act"], and, in particular, § 12926(c), which identifies the State and its agencies as covered employers under that Act, § 12940, which prohibits job discrimination against the physically handicapped, and § 12965(b), which provides for a private civil action in state court. It has been commented that this State remedy is actually superior to that offered by Federal statutes. (See, Gelb and Frankfurt, California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination, 34 Hast. L.J. 1055, 1090-1105 (March-July 1983).)

Respondent, however, chose to frame his remedy as a section 504 claim against two State entities⁷ in federal district court, thus bringing to full issue the sovereign immunity defense and the essential concern of these State petitioners:

"A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst II, supra, 104 S.Ct. at p. 907.

2. Necessary Conditions for Abrogation or Waiver of Immunity

7/ Petitioner Atascadero State Hospital is operated by petitioner California Department of Mental Health for the care, treatment and education of the mentally disordered. (California Welfare and Institutions Code § 7200.)

When this Court's decisions respecting the Eleventh Amendment are analyzed, it is clear that in the context of section 504 there has been no abrogation of sovereign immunity by Congress, nor has there been any waiver of such immunity by these petitioners. At the same time, petitioners respectfully submit that it becomes manifest that in reaching the conclusion that it did, the Ninth Circuit panel erred both in their analysis and application of those decisions, and in their unsupported conclusion that section 504 is an enactment pursuant to the enforcement clause of the Fourteenth Amendment.

Because there is a sharp dispute between the parties as to what is the appropriate test to be applied in

Eleventh Amendment cases, petitioners believe it is beneficial to review in some depth the relevant sovereign immunity cases in order to establish what is the appropriate test.

While both the principle of sovereign immunity as exemplified by the Eleventh Amendment and the relevant decisions applying that principle have been the subject of much comment and suggestion-making by critics,⁸ the Court's recognition and protection of the doctrine have endured. Indeed, the most recent decisions of this Court reaffirm the doctrine's vitality and serve to polish its shield.

The Court has recognized that a

8/ Indeed, as early as 1924 it was suggested that governmental immunity be abolished. Borchard, Governmental Responsibility in Tort, 34 Yale L.J. 1.

State's immunity can be relinquished by its consent to abrogation or, in limited circumstances, through abrogation by Congress. Under both of these exceptions, the Court's rulings have been unequivocal and consistent in requiring a clear statement in the relevant statutory scheme⁹ that "Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court." Employees v. Missouri Public Health Dept., supra, 411 U.S. at p. 283.

Consequently, whether an examination of petitioners' immunity vis-a-vis the Rehabilitation Act focuses upon consent (waiver) or abrogation, one finds

9/ The sole asserted aberration to this requirement is found in Hutto v. Finney, 437 U.S. 678 (1978), discussed below.

that the determining factor is invariably the clarity of Congressional intent to subject States to suit in federal court.

Thus, in Edelman v. Jordan, 415 U.S. 651 (1974), we find the clearest statement of the rule, which still pertains today, for testing claims of consent or constructive waiver. In that case, the Court of Appeals affirmed an award of retroactive relief against State officials based upon their noncompliance with federal requirements under the federal-state aid program known as Aid to the Aged, Blind, or Disabled ("AABD").

In anticipation that its award might run afoul of an Eleventh Amendment objection, the Court of Appeals additionally ruled that the State had

waived its immunity by participating in the AABD program.¹⁰ It was because of this latter holding that this Court in Edelman found it necessary to announce the following test:

"The question of waiver or consent under the Eleventh Amendment was found in those cases¹¹ to turn on whether Congress had intended to abrogate the immunity in question, and

10/ 415 U.S. at p. 671

11/ Employees v. Missouri Public Health Dept., supra; Parden v. Terminal R. Co., 377 U.S. 184 (1964); Petty v. Tennessee-Missouri Com'n., 359 U.S. 275 (1959). Because these latter two cases antedate the Edelman decision and because their holdings, for the most part, have been eviscerated (see Edelman, supra, 415 U.S. at p. 672; Employees, supra, 411 U.S. at pp. 279-285), no separate discussion of them is contained in this brief. Petitioners did include a detailed treatment of them in their Petition herein. (Petn., pp. 15-20.)

whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity."

(Footnote added.) Id., 415 U.S. at p. 672.

Edelman, therefore, resolved that when a State's immunity is challenged, a two-part test is to be applied: (1) abrogation and (2) consent (waiver). The Edelman decision has further significance in that it proceeded to define the requisites of this dual inquiry.

As to the abrogation part of the test, a court must first ascertain "the threshold fact of congressional authorization to sue a class of defendants which literally includes

States. . . . " Id., 415 U.S. at p. 672. (Emphasis added.)

On the consent or waiver side of the test, the Court observed:

"In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" (Quoting from Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).) Id., 415 U.S. at p. 673.

The Edelman decision then proceeded to apply these standards to the legislation in question and concluded that

there was no evidence of intended abrogation, nor was mere participation in a federal assistance program sufficient to constitute consent.¹² Id., 415 U.S. at pp. 673-674.

The cases subsequent to Edelman have adhered to and fortified the requirement that before abrogation of immunity will be declared to have been effected, there first must be found a clear and expressed intent by Congress that it indeed considered the question and intended to subject States to suit in federal court.

In the proceedings below, respondent has argued that the Edelman holding has

12/ Given the test set forth by Edelman, a court today, presented with the same facts and circumstances, would not even reach the issue of consent or waiver, once it had failed to find an explicit abrogation.

been attenuated by two other decisions of this Court. The first of these, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), actually cited with approval and applied the rule of Edelman, terming it the "necessary predicate." Id., 427 U.S. at pp. 451-452.

The legislation under examination in Fitzpatrick was Title VII of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 253, 42 U.S.C. § 2000e et seq. In 1972, provisions of Title VII were amended, whereby former express exclusions of States and State agencies as "employers" and of State civil service personnel as "employees" were struck, and replaced by express inclusion of both under the Title's coverage. Id., 427 U.S. at p. 449, n. 2. (See, 42 U.S.C. § 2000e (a), (f).)

In addition, employees aggrieved under Title VII were explicitly conferred a private civil remedy (42 U.S.C. § 2000e-5(f)(1)), and Congress provided for an express grant of jurisdiction to federal district courts as to such actions. (42 U.S.C. § 2000e-5(f)(3).)

In the light of these statutory provisions, therefore, the Court in Fitzpatrick had little difficulty in finding the "necessary predicate" of Edelman -- the "threshold fact of congressional authorization to sue the State as employer" -- clearly present. Id., 427 U.S. at p. 452.

The remainder of the opinion in Fitzpatrick involved the Court's concern with the potential impact on the doctrines of federalism and sovereign

immunity that was posed by the imposition of Title VII obligations upon the States. Satisfied that the Eleventh Amendment is limited by the enforcement provisions of section 5 of the Fourteenth Amendment, the Court concluded:

"We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." (Footnote and citations omitted; emphasis added.) Id., 427 U.S. at p. 456.

In sum, the decision in Fitzpatrick

reaffirmed the Edelman requirement of a clear Congressional statement regarding the threshold fact of abrogation. It further established that Congress retains the power under the Fourteenth Amendment to effect an abrogation, notwithstanding the Eleventh Amendment, provided that it clearly expresses its intent to subject States to suit in federal court.¹³

13/ This latter holding of Fitzpatrick has been interpreted as having erased the necessity for the second part of the Edelman test, i.e. States' consent to suit, when Fourteenth Amendment legislation is at issue. Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L.R. 139, 171 (1977); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suits Upon the States, 126 U.Pa. L.Rev. 1203, 1235-1236 (hereinafter, Field). Of course, the presence of consent or implied waiver becomes irrelevant, anyway, if the subject legislation fails the threshold question on express abrogation. See, note 12, supra.

Hutto v. Finney, 437 U.S. 678 (1978) is another case which is often mischaracterized and which has been relied upon by respondent. In holding that attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976¹⁴ could be awarded against States despite the Eleventh Amendment, the Court's attention was focused on the nature of the relief, rather than adherence to any test that might apply in the case of substantive relief. Thus in response to the State's argument that Congressional abrogation of sovereign immunity must be found in express statutory language, the Court distinguished Edelman and Employees as follows:

"But these cases concern

14/ Pub.L. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988.

retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking only prospective relief.

"The Act imposes attorney's fees 'as part of the costs.' Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity." (Emphasis added.)

Id., 437 U.S. at p. 695.

The statutory fee provisions examined in Hutto did not expressly include States as liable parties, although the Court found such intended inclusion clear from both legislative history and Congressional comments.

Based upon dicta in a footnote of the

opinion¹⁵, respondent and others have offered the Hutto decision as authority for the proposition that the search for the threshold fact of Congressional authority to sue States is not limited to language in the statute itself. They assert that abrogation may be found through a review of relevant legislative history when the statute is a Fourteenth Amendment enactment.

Such a reading of the Hutto opinion, however, ignores the essential holding of the case and its focus on the fact that "costs" were the stake. This interpretation also overlooks the majority opinion's own distinction of

15/ "Applying the standard appropriate in a case brought to enforce the Fourteenth Amendment, we have no doubt that the Act is clear enough to authorize the award of attorney's fees payable by the State." Id., 437 U.S. at pp. 698-699, n. 31.

holding:

"But an award of costs . . . could hardly create any such hardship for a State. Thus we do not suggest that our analysis would be the same if Congress were to expand the concept of costs beyond the traditional category of litigation expenses." Id., 437 U.S. at p. 697, n. 27.

Consequently, State petitioners submit that Hutto has no application to claimed Congressional efforts at abrogation which here would impose substantive liability on the merits against States and goes beyond traditional concepts of litigation costs.¹⁶

16/ In fact, it is questionable whether the Hutto decision would have been the (continued)

This view comports with that stated in Quern v. Jordan, supra, 440 U.S. at p. 344, n. 16:

"While Hutto, unlike Fitzpatrick and Employees, did not require an express statutory waiver of the State's immunity . . ., the Court was careful to emphasize that it was concerned only with expenses incurred in

same at all had the Court had the counsel of its subsequent holdings in Quern v. Jordan, 440 U.S. 332 (1979) and Alabama v. Pugh, 438 U.S. 711 (1978). One of the more influential reasons which led the Hutto court to its conclusion that the Act was "clear enough" (see, note 15, supra) was the fact that "indeed, the Act primarily applies to laws passed specifically to restrain state action." Id., 437 U.S. at p. 694. Yet, one of those very "laws" referenced by the Act, and the law which underlay the lower court's fee award in Hutto, i.e. 42 U.S.C. § 1983, was found not to apply to States in both the Quern and Alabama cases. This dichotomy was the precise concern expressed by Justice Powell in his dissenting opinion in Hutto. Id., 437 U.S. at p. 704, et seq.

litigation seeking prospective relief while the other cases involved retroactive liability for prelitigation conduct." (Emphasis added.)

The Court in Quern concerned itself with determining whether § 1983 (a Fourteenth Amendment enactment) effectuated an abrogation of sovereign immunity. The Court cited with approval those portions of the decisions in Fitzpatrick and Employees which had adhered to the standard of express statutory abrogation. Id., 440 U.S. at pp. 343-344. With respect to § 1983, the Court found the statute's general language ("every person") insufficient to constitute "an intent to sweep away the immunity of the States." Id., 440 U.S. at p. 345. In also finding the

statute's legislative history wanting, the Court expressly noted, that by expanding its inquiry beyond the statutory language, it was not deciding that such an examination was necessary. Id., 440 U.S. at pp. 344-345, n. 16.

Lastly, in Pennhurst II, supra, 104 S.Ct. at p. 907, the Court once again reaffirmed that, irrespective of the source of Congress' power, its legislation must first evidence express abrogation:

"Similarly, although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, see Fitzpatrick v. Bitker [sic], 427 U.S. 445, 96 S.Ct. 2666, 49

L.Ed.2d 614 (1976), we have required an unequivocal expres-
sion of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" (Quoting from Quern v. Jordan, supra, 440 U.S. at p. 342.) (Inserts and emphasis added.)

As demonstrated below, when the principles elucidated in Edelman and its progeny are applied to the instant case, it is apparent that the provisions of the Act fall far short of evidencing either abrogation or consent.

B. The Rehabilitation Act of 1973 and, In Particular, Section 504, Do Not Reflect Any Evidence of Congressional Intent to Abrogate States' Immunity

The Rehabilitation Act of 1973, Pub.L. 93-112, 87 Stat. 357, 29 U.S.C. § 701 et seq., enacted in succession to the Vocational Rehabilitation Act (former 29 U.S.C. §§ 31-42), continued in force one of the nation's oldest grant-in-aid programs.¹⁷ The Act is a comprehensive federal program aimed at improving the lot of the handicapped. Consolidated Rail Corp. v. Darrone, supra, 104 S.Ct. at p. 1250.

The Act is divided into six subchapters which, in turn, state the purposes of the legislation. For example, subchapter I, § 720(a) (Vocational Rehabilitation Services)

17/ A thorough review of the rehabilitation program in the United States is set forth in S.Rep. No. 93-318, 93rd Cong., 1st Sess. 2, reprinted in [1973] U.S. Code Cong. & Ad. News 2076.

provides that its purpose is to authorize grants to assist States to meet the needs of handicapped individuals to prepare for and engage in gainful employment. To similar effect are: subchapter III, § 770(2) (authorize grants to assist in the provision of vocational training) and § 773(a) (assist and encourage the provision of rehabilitation facilities); and subchapter VII, § 796 (authorize grants to assist States in the provision of comprehensive services for independent living).

These declarations of purpose make it clear that the Act is a typical federal spending program. See, Pennhurst I, supra, 451 U.S. at p. 18 (discussing the Developmentally Disabled Assistance and Bill of Rights Act of 1975, as added,

Pub.L. 94-103, 89 Stat. 496, as amended, 42 U.S.C. § 6000 et seq.)

Other salient elements of the Rehabilitation Act provide for the submission and approval of State plans (29 U.S.C. § 721) and the sanction of a federal funding cutoff for non-compliance therewith. (29 U.S.C. § 721(c)(1).) Another significant provision is found at section 775(e) of the Act, wherein it is specified that grantees under that subchapter, whether a public or private agency, may be sued by the federal government in loan recovery actions brought in federal district courts. Also, section 792(d) provides for federal court jurisdiction in architectural barrier cases.

When Congress turned to creating a remedy for handicapped individuals

against recipients under the Act, it did not even provide for an explicit private cause of action, let alone express an intent to abrogate States' sovereign immunity. Rather, the remedies, rights and procedures set forth in Title VI¹⁸ of the Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 252, 42 U.S.C. § 2000d et seq.) are incorporated and accorded persons aggrieved by section 504 recipients. (29 U.S.C. § 794a(a)(2).)

The Act simply contains no language which addresses or even infers an abrogation of immunity. The opinion below conceded this point (Petn., p. A-3), as did the only other Circuit

18/ Title VI, of course, is equally silent with respect to the provision of a private cause of action. Nor does it contain any language expressing any effort or intent to subject States to suit in federal courts.

decisions which have considered the issue.¹⁹ Instead, the Ninth Circuit focused on the observation that the Rehabilitation Act "contains extensive provisions under which states are the express intended recipients of federal assistance." (Petn., p. A-3.)²⁰

19/ Ciampa v. Massachusetts Rehabilitation Com'n., 718 F.2d 1, 3 (1st Cir. 1983) and Miener v. State of Mo., 673 F.2d 969 (8th Cir. 1982), cert. den., 459 U.S. 909 (1982), both of which upheld the defense of sovereign immunity.

20/ The opinion also noted that an implementing regulation (45 C.F.R. § 84.3(f)) broadly defines recipients to include States. (Petn., p. A-3.) Neither this nor any other relevant regulation, however, in any way addresses suits in federal courts or States' immunity. The regulations do concern a number of issues and procedures under the Act, including governmental sanctions, wherein the inclusion of States as "recipients" is germane. (See, e.g., 45 C.F.R. § 84.6.) To infer that 45 C.F.R. § 84.3(f) lends support to a finding that sovereign immunity has been abrogated is to deem those regulations (continued)

It is not enough that States may be thoroughly enmeshed in the statutory scheme, or even explicitly mentioned as subject to various of the legislative provisions and conditions. Rather, the initial part of the test seeks to ascertain "the threshold fact of congressional authorization to sue a class of defendants which literally includes States." (Emphases added.) Edelman v. Jordan, supra, 415 U.S. at p. 672. Accord, Employees v. Missouri

far more pervasive weight than even the promulgating federal agency would accord them. In paragraph 8, subpart A, of Appendix A to 45 C.F.R. Part 84, "Analysis of Final Regulation," it is stated: "Private rights of action . . . To confer such a [private] right [of action] is beyond the authority of the executive branch of Government." (Inserts added.) To confer or imply by regulation a right to sue States in federal courts, notwithstanding sovereign immunity, would constitute an even greater ultra vires effort by the Executive branch.

Public Health Dept., supra, 411 U.S. at p. 285.

The Rehabilitation Act presents language and circumstances even less compelling than those that were unsuccessfully examined in the Employees case. There, the argument was made that Congress had lifted States' immunity under the Fair Labor Standards Act ("FLSA") of 1938, June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C. § 201 et seq. Even though the Court found that State employers were indeed literally covered under the FLSA and that a private remedy was expressly provided, the bar of the Eleventh Amendment was upheld.

What was found lacking by the Court in Employees was any indication by clear language that Congress intended to subject States to suit in federal courts

notwithstanding the Eleventh Amendment.
411 U.S. at p. 285.

As mentioned above, the Rehabilitation Act does not even explicitly refer to a private remedy, let alone authorize jurisdiction in all courts.

Congress knows how to clearly express its intent to abrogate sovereign immunity and it will not be presumed to have done so silently. Id., 411 U.S. at pp. 284-285. When it added section 794a to the Act in 1978, it presumably was aware of the Court's decisions and the standards announced in Fitzpatrick, Edelman and Employees.²¹

In fact, in the very next year after

21/ "It is always appropriate to assume that our elected representatives, like other citizens, know the law [including court precedents]" (Insert added.) Cannon v. University of Chicago, 441 U.S. 677, 696-697, 699 (1979).

the Employees decision Congress amended § 216(b) of the FLSA. As contrasted with the statutory language found insufficient by the Court to constitute an abrogation of immunity, i.e. "[a]ction to recover such liability may be maintained in any court of competent jurisdiction," the section was amended to read:

"Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State Court" (Emphases added.) (Pub.L. 93-259, § 6(d)(1), 88 Stat. 61, 29 U.S.C. § 216(b).)

A few other examples demonstrate that Congress does know how to provide at least the foundational language for an

attempt at abrogation of States' immunity. In 1975 Congress amended the Medicaid Act to read:

"(g) Notwithstanding any other provision of this title, a State plan for medical assistance must include a consent by the State to the exercise of the judicial power of the United States in any suit brought against the State or a State officer by or on behalf of any provider of services . . . , and a waiver by the State of any immunity from such a suit conferred by the 11th Amendment to the Constitution or otherwise." (Pub.L. 94-182, § 111, 89 Stat. 1054, 42 U.S.C. § 1396a(g), repealed, Pub.L. 94-552, § 1, 90 Stat. 2540 (1976).)

Of course, Title VII, the subject of Fitzpatrick v. Bitzer, supra, stands as a successful expression of Congressional abrogation. That Title's language explicitly includes governmental agencies as "persons" for purposes of suit (42 U.S.C. § 2000e(a)), provides for a private civil right of action (42 U.S.C. § 2000e-5(f)(1)) and vests jurisdiction in federal courts (42 U.S.C. § 2000e-5(f)(3)).

A final sample from the Noise Control Act of 1978 (Pub.L. 92-574, 86 Stat. 1234, 42 U.S.C. § 49 et seq.) demonstrates that Congress, even when it may harbor doubts about its power to abrogate sovereign immunity, knows how to launch a trial balloon in the direction of abrogation:

" . . . [A]ny person . . . may

commence a civil action on his own behalf -

"(1) against any person (including (A) the United States and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)" 42 U.S.C. § 4911(a).

Nothing found in the Rehabilitation Act, however, even approaches the foregoing expressions of Congressional attempts at abrogation. The Act contains no express private right of action, no investiture of jurisdiction in district courts and, perforce, no inclusion of States as defendants in private federal court actions.

Finding the Act entirely lacking on the first part of the appropriate test,

i.e. express abrogation, it becomes unnecessary to proceed to apply the second part, i.e. consent or waiver. Nonetheless, were such an inquiry to be conducted, it is readily apparent that petitioners have not consented to or waived their immunity from suit in federal court.

Other than being alleged recipients of federal financial assistance under the Act,²² it has not been claimed that petitioners have indicated consent or waiver by any other means or circumstances.

"The mere fact that a State participates in a program through which the Federal Government provides assistance for the

22/ See, J.A., pp. 6-7.

operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." (Emphasis added.) Edelman v. Jordan, supra, 415 U.S. at p. 673.

This Court expressed the same view in Florida Dept. of Health v. Fla. Nursing Home Assn., 450 U.S. 147, 150 (1981).

"'. . . [W]e will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" (Quoting from Edelman, 415 U.S. at p. 673.)

In the case just cited, the Court was

called upon to examine the Medicaid Act (42 U.S.C. § 1396a et seq.), a statutory scheme which contains a vastly greater degree of participation on the part of member States (and attendant federal control thereover) than is found in the Rehabilitation Act. The Court declared, however, that neither participation in and receipt of federal assistance under a government program, nor a concomitant agreement to obey federal law is sufficient to waive the protection of the Eleventh Amendment.²³ Id.

In conclusion, the Rehabilitation Act offers no language, explicit or otherwise, which satisfies the settled

23/ The Ninth Circuit opinion states that "in this case, there is more than the 'mere fact' of state participation" (Petrn., p. A-5), but the decision never identifies what "more" there is.

requisites for abrogation or waiver of sovereign immunity. Failing in that regard, the inquiry should end there. This would be so even if the legislation had been enacted pursuant to section 5 of the Fourteenth Amendment, as contended by respondent. (See discussion under Section C below.) The Court must still find in the statutory scheme the threshold fact of clear Congressional authorization to sue the States. (Fitzpatrick v. Bitzer, supra.²⁴)

24/ "We concluded that none of the statutes relied upon by plaintiffs in Edelman contained any authorization by Congress to join a State as defendant (Emphasis added.)

"Our analysis begins where Edelman ended, for in this Title VII case the 'threshold fact of congressional authorization', Id., at 672, to sue the State as employer is clearly present." (427 U.S. at p. 452.)

**C. The Rehabilitation Act
Represents an Exercise by
Congress Under Its Spending
Power, Not Under Section 5 of
the Fourteenth Amendment**

Respondent has sought to avoid application of the standard of express statutory abrogation, which he concedes is the test applied in the Edelman, Quern and Florida Dept. of Health cases, by distinguishing those cases as involving Spending Clause²⁵ legislation. He then proposes that the Rehabilitation Act was passed pursuant to both the Spending Clause and Section 5 of the Fourteenth Amendment and that under the Fitzpatrick opinion this Court can look beyond the statute itself for

25/ "The Congress shall have Power To . . . provide for the . . . general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1.

the requisite intent to abrogate. (See Respondent's Brief in Opposition to Petn., pp. 12-13.)

As has been discussed above, however, Fitzpatrick was concerned only with the question of whether Congress possessed the power to abrogate immunity, as opposed to determining where and how the exercise of that power must be expressed. This Court was satisfied that Title VII contained the requisite statutory language of abrogation (427 U.S. at pp. 449, n. 2, 452.)

Additionally, it should be noted that both Edelman and Quern declared and applied their principles in the context of a Fourteenth Amendment enforcement enactment, § 1983 of the Civil Rights Act

of 1871.²⁶

Finally, even if one accepts respondent's argument that a broader search is permissible with respect to Fourteenth Amendment legislation, the argument has no application here. The Act is typical Spending Clause legislation.

As this Court recently noted in Consolidated Rail Corp. v. Darrone, supra, 104 S.Ct. at p. 1250:

"The language of the section (504) is virtually identical to that of § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, that similarly

26/ "There is no question but that § 1983 was enacted by Congress under § 5 of the Fourteenth Amendment." (Quern v. Jordan, supra, 440 U.S. at p. 351, n. 3 (concurring opinion of J. Brennan, joined in by J. Marshall).)

bars discrimination (on the ground of race, color, or national origin) in federally-assisted programs."

Title VI, in turn, has been unequivocally declared by the Court to be "Spending Clause legislation," which prohibits discrimination only in federally assisted programs, in the fashion of a "typical 'contractual' spending power provision." Guardians Ass'n. v. Civ. Serv. Com'n. of City of N.Y., supra, 103 S.Ct. at p. 3231.

In addition, there exists no indication, explicit or implicit, in the Act or its history²⁷ to support the

27/ As an exception in this regard, respondent has pointed to a statement by Senator Cranston, discussed more fully in section D below, to the effect that Congress may authorize attorney's fees pursuant to § 505(b) under, among other (continued)

assertion that Congress believed it was flexing its Fourteenth Amendment powers here, and this Court has announced that it will not presume that source of power in the absence of such evidence.²⁸

D. Reference to the Legislative History of the Rehabilitation Act Does Not Reveal Any Congressional Intent to Abrogate States' Immunity

Respondent has urged below that the Fitzpatrick and Hutto decisions permit Congressional intent to abrogate

things, § 5 of the 14th Amendment. This comment, of course, in no respect implies that in authorizing fees under § 505(b) Congress was, in fact, exercising its 14th Amendment power, or that § 504, enacted five years earlier, had represented an implementation of that power.

28/ See, Pennhurst I, supra, 451 U.S. at pp. 15-18. Cf., EEOC v. Wyoming, 460 U.S. 226, 243-244, n. 18 (1983).

sovereign immunity to be found in the legislative history of the Act. Petitioners disagree that those decisions require or counsel such a perusal.²⁹ Moreover, even under a generous reading of those cases they are limited in their application to statutes passed pursuant to the enforcement clause of the Fourteenth Amendment; the Rehabilitation Act is a Spending Clause provision.³⁰

Nonetheless, even if the Act were considered an exercise of Congress' Fourteenth Amendment enforcement power, or for any other reason a search beyond the statutory language were deemed

29/ See, discussion under Section B above.

30/ See, discussion under Section C above.

appropriate, one discovers there a paucity of information relevant to an abrogation of States' immunity. Petitioners, of course, are not the first to make this statement. Two Circuit Courts which have performed a review of the legislative history have reached the same conclusion. The Ninth Circuit opinion at issue states:

"Nor is this a case in which the legislative history makes it clear that Congress intended to make states liable, regardless of their consent." (Petn., p. A-3.)

Arriving at the same conclusion was the First Circuit in Ciampa v. Massachusetts Rehabilitation Com'n., supra, 718 F.2d at p. 3:

"The current section 504 and relevant legislative histories .

. . indicate that Congress did not consider the issue of Eleventh Amendment immunity in enacting or amending section 504. Indeed, Congress never got as far as explicitly providing a private cause of action under section 504. Congress cannot by omission override an important constitutional immunity. We conclude that in enacting section 504, Congress did not abrogate the states' Eleventh Amendment immunity." (Footnote omitted.)

In prior briefs in these proceedings respondent has not been able to muster any legislative references which demonstrate an intent under the Act to subject States to private suit in federal courts. The only offerings

which have been made are limited to comments concerning the propriety of attorney's fees awards under section 505(b) of the Act (29 U.S.C. § 794a(b)). Thus, at pages 9-10 of respondent's brief in opposition to the instant petition, we find an isolated statement by Senator Cranston in 1978 in which he expresses the opinion that attorney's fees under section 505(b) may be collected from State officials or State agencies regardless of whether such agency is a named party. Senator Cranston concludes his remarks by stating:

"Thus, in accordance with the Supreme Court's decision in *Hutto v. Finney* . . . the 11th Amendment is no bar to the recovery of attorney's fees under

proposed section 505(b) from
State government"³¹

While respondent has argued that these comments suggest a Congressional understanding that States are somehow proper parties in private federal court suits under section 504, the text indicates just the contrary. By finding it necessary to make his case for allowing fee awards against States, despite the Eleventh Amendment, it seems a necessary inference that the Senator likewise must have accepted the corollary, i.e., that relief beyond fees could not be constitutionally impressed against States. His citation of the Hutto decision (holding attorney's fees awards to be "costs" and, thus,

^{31/} 124 Cong.Rec. § 15591 (Sept. 20, 1978).

traditionally not repugnant to sovereign immunity) lends further support to this inference.

The legislative history attending the Act is otherwise silent with respect to any mention or consideration of awards or suits vis-a-vis States.

Congress had the opportunity in 1978 when it added section 505 (29 U.S.C. § 794a) to the Act, and subsequently³² to provide for an attempted abrogation of sovereign immunity by employing express statutory language to that effect. Or, it might have used an alternative analog for the Act's remedial provisions, such as Title VII, which it did accord to aggrieved federal employees under the

32/ This past year saw the enactment of the Rehabilitation Amendments of 1984, Pub.L. 98-221, 98 Stat. 17 (Feb. 22, 1984).

Act (29 U.S.C. § 794a(a)(1)). Instead, Congress has chosen to incorporate Title VI remedies and say nothing in the Act or during its development on the subject of States' immunity. Such silence and circumstances are themselves significant indications of a legislative intent that the traditional and constitutional immunity of States were not being overridden in this Act. Quern v. Jordan, supra, 440 U.S, at pp. 341-345.

II

THE RESPONDENT'S SUGGESTION THAT THIS COURT REVERSE LONGSTANDING DECISIONS IS INAPPROPRIATE

In an effort to avoid application of the principles discussed in the preceding Sections, respondent has

suggested³³ that this Court use this occasion to overrule Hans v. Louisiana, supra, at note 2, or, at the least, overrule Edelman v. Jordan, supra.

Petitioners consider it a remarkable suggestion that such significant relief would be requested at this judicial level in a case in which a different pleading decision or strategy at the district court level may well have obviated the present review. Moreover, this Court has had numerous opportunities in the past ninety years to retreat from the holding established by the Hans decision. In fact, its holding was reaffirmed only last term in Pennhurst II, supra, 104 S.Ct. at pp. 906-907.

33/ Respondent's Brief in Opposition, pp. 14-16.

Whether, as discussed in Pennhurst II, the prohibition as to suits against unconsenting States is explained as constitutionally compelled by the Eleventh Amendment, Id., or by traditional sovereign immunity doctrine, Id., 104 S.Ct. at p. 930 (dissenting opinion of J. Stevens), it has been endorsed by a long line of cases. Id., 104 S.Ct. at p. 933. It is a principle of law to which all branches of government, both Federal and State, in their respective functions have deferred.

As the Court itself declared in Hans:

"It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution

in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence." (Emphasis added.) 134 U.S. at p. 21.

The Hans decision has enjoyed nearly a century of precedence. Edelman stands on equally firm ground. This is not the case to challenge their validity; rather, the sole issue presented here is whether sovereign immunity has been abrogated or waived under a specific legislative enactment. Whether States' immunity from suit is defensible on constitutional, traditional sovereign immunity or other grounds, is the subject for a separate briefing and petitioners would request that opportunity should the Court be so

disposed.³⁴

At this juncture, suffice it to say that federal courts and state governments alike are entitled to perform their respective functions with the benefit of reasonable illumination from the congressional side. If it is

34/ It is interesting to note, though, that "writers on the public law," including one (Professor Field) cited by respondent, do not suggest that Hans would or should yield a different result under their respective approaches to sovereign immunity analysis. See, Field, supra, at p. 1266. Accord, Jacobs, The Eleventh Amendment and Sovereign Immunity (Greenwood Press, Inc.; 1972), p. 110.

Similarly, commentators support the retention of an Edelman clear statement rule. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issued in Controversies about Federalism, 89 Harv. L.Rev. 682, 695 (1978); Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L.Rev. 1413, 1441 (1975); Field, supra, at p. 1280, n. 324.

deemed by Congress that national or other interests require abrogation of the traditional immunity of States, it should clearly express that intent. This is particularly true of legislation under the Spending Clause. If, as a condition on the grant of federal money, Congress intends to impose a forfeiture or waiver of immunity, it must do so unambiguously. See, Pennhurst I, supra, 451 U.S. at p. 17; Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 204, n. 26 (1982).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

THOMAS E. WARRINER,
Assistant Attorney General

ANNE S. PRESSMAN,
Supervising Deputy Attorney
General

JAMES E. RYAN,
Deputy Attorney General

G. R. OVERTON,
Deputy Attorney General

Attorneys for Petitioners

JAN 18 1985

ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ATASCADERO STATE HOSPITAL
and CALIFORNIA DEPARTMENT
OF MENTAL HEALTH,

Petitioners,

vs.

DOUGLAS JAMES SCANLON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

JOHN K. VAN DE KAMP,
Attorney General of
the State of California
THOMAS E. WARRINER,
Assistant Attorney General
ANNE S. PRESSMAN,
Supervising Deputy
Attorney General
JAMES E. RYAN,
Counsel of Record
G.R. OVERTON
Deputy Attorney General
Suite 800
3580 Wilshire Blvd.
Los Angeles, CA 90010
(213) 736-2279
Attorneys for Petitioners

JOSEPH LAWRENCE
MARILYN HOLLE
WESTERN LAW CENTER
FOR THE HANDICAPPED
AT LOYOLA LAW SCHOOL
1441 West Olympic Blvd.
P.O. Box 15019
Los Angeles, CA 90015

MARY-LYNNE FISHER
LOYOLA LAW SCHOOL
1441 West Olympic Blvd.
P.O. Box 15012
Los Angeles, CA 90015
(213) 736-1031
Attorneys for
Respondents

PETITION FOR WRIT OF CERTIORARI
FILED AUGUST 31, 1984
PETITION GRANTED NOVEMBER 26, 1984

53

TABLE OF CONTENTS

DOCUMENTS INCLUDED IN JOINT APPENDIX

	Page
Chronological List of Docket Entries	J.A. 1
Complaint For Violation of Civil Rights	J.A. 2
Notice of Motion and Motion to Dismiss; Points and Authorities in Support Thereof	J.A. 24

DOCUMENTS INCLUDED IN APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Decision Below

Ninth Circuit Court of Appeals Opinion (June 13, 1984)	A-1
--	-----

Prior Opinions and Orders

United States Supreme Court Order (March 19, 1984)	A-6
Ninth Circuit Court of Appeals Opinion (May 24, 1982)	A-7
District Court Opinion and Order	A-22



**Chronological List of Relevant
Docket Entries**

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA:**

**Complaint for Violation of Civil Rights
filed November 20, 1979**

**Notice of Motion and Motion to Dismiss
filed December 31, 1979**

**Order Granting Defendants' Motion to
Dismiss
filed January 30, 1980**

**Notice of Appeal
filed February 29, 1980**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**Opinion
filed May 24, 1982**

**Opinion, after remand
filed June 13, 1984**

**IN THE SUPREME COURT
OF THE UNITED STATES**

**Order
filed March 19, 1984**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 79 04523 MrP (Kx)

DOUGLAS JAMES SCANLON,

Plaintiff,

v.

ATASCADERO STATE HOSPITAL,
CALIFORNIA DEPARTMENT OF
MENTAL HEALTH,

Defendants.

INTRODUCTORY STATEMENT

1. Plaintiff DOUGLAS JAMES SCANLON brings this suit to remedy the unlawful actions taken against him by defendant ATASCADERO STATE HOSPITAL. Defendant refused to employ plaintiff SCANLON in a

2.

salaried position as a graduate student assistant, a position which he had successfully performed as a volunteer, solely because of plaintiff's physical handicaps, diabetes mellitus and loss of sight in one eye. Plaintiff brings this action under the federal statutes prohibiting discrimination in employment on the basis of physical handicap by recipients of federal financial assistance, 29 U.S.C. § 794, and seeks monetary damages, employment and declaratory and injunctive relief, and attorney's fees and costs.

JURISDICTION

2. Jurisdiction of this action is conferred by

(a) 28 U.S.C. § 1331(a), as amended, this being an action wherein the matter in controversy exceeds the

sum or value of \$10,000 exclusive of interest and costs, and arises under the laws of the United States;

(b) 28 U.S.C. § 1343(3) and (4), this being an action to redress the deprivation under color of state law of a right secured by an Act of Congress providing for equal rights and to recover damages and to secure equitable and other relief under an Act of Congress providing for protection of civil rights;

(c) 29 U.S.C. § 794 and 795, this being an action by an otherwise qualified handicapped individual who has been subjected to discrimination under a program receiving federal financial assistance;

(d) 28 U.S.C. §§ 2201 and 2202, this being a case of actual controversy

within the jurisdiction of the Court where the relief sought by plaintiff includes a declaration of the rights and other legal relations to the plaintiffs.

PARTIES

3. Plaintiff DOUGLAS JAMES SCANLON is a citizen of the United States and a resident of San Luis Obispo County, California. He was, at all times relevant, an undergraduate student in recreation administration at California Polytechnic Institute, San Luis Obispo. He is a physically handicapped individual as that term is defined in the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 706(6) and § 1413(h) of the Fair Employment Practices Act, California Labor Code § 1410 et seq. He is also a "qualified

handicapped individual" as defined by the relevant regulations implementing § 504 of the Rehabilitation Act with respect to recipients of federal financial assistance from HEW, 45 C.F.R. § 84.3(k)(1).

4. Defendant ATASCADERO STATE HOSPITAL is a public institution whose administrative offices are located in Atascadero in San Luis Obispo County. It is a recipient of federal financial assistance as defined by the relevant regulations, 45 C.F.R. § 84.3(f). It receives funds from the Department of Health, Education and Welfare. It is an employer as defined in § 1413(d) of the Fair Employment Practices Act and receives financial assistance for its program and activities from the State of California. It has authority to approve

or disapprove preemployment medical examinations.

5. Defendant DEPARTMENT OF MENTAL HEALTH and its predecessor Department of Health are statutorily established, duly appointed and acting agencies of the State of California. Department of Mental Health or its predecessor Department of Health at all times herein mentioned was the agency responsible for supervising and administering Atascadero State Hospital so that it complies with applicable provisions of federal and state law. It is a recipient of federal financial assistance as defined by the relevant regulations implementing § 504 of the Rehabilitation Act, 45 C.F.R. § 84.3(k)(1).

STATEMENT OF FACTS

6. Plaintiff has diabetes mellitus which has been stabilized by insulin therapy. Four years ago he developed diabetic retinopathy (hemorrhages of the retina). Three years ago the retinopathy was stabilized following laser treatment. Plaintiff has 20/25 vision in his left and no useable vision in his right eye. Plaintiff's physician certified that his diabetes is well-controlled and that he has no physical disabilities that would prevent him from working as graduate student assistant at Atascadero State Hospital.

7. During the spring of 1977, plaintiff worked as a volunteer recreation therapist at Atascadero State Hospital for approximately three months. His handicap in no way

interfered with the performance of his duties.

8. On February 6, 1978, plaintiff was interviewed by employees of defendant Atascadero State Hospital for a salaried half-time, nine-month position as a graduate student assistant. The position would have fulfilled academic requirements for graduation in plaintiff's recreation administration major at Cal Poly San Luis Obispo. The position would also have enabled plaintiff to terminate his dependency on Social Security Disability Insurance Benefits.

9. On or about February 6, 1978, Plaintiff was offered the position of graduate student assistant subject to passing a pre-employment physical examination.

10. Plaintiff underwent such an examination which was administered by a physician who Plaintiff believes to have been an employee of defendant ATASCADERO STATE HOSPITAL, on or about February 8, 1978. Plaintiff was not informed prior to the examination that his blood sugar level would be tested and therefore had not fasted for several hours before the test, as established medical procedure requires. During the examination the physician told plaintiff that he would recommend against hiring him because the liability for any damage to his remaining eye would fall on the state.

11. In February 1978, plaintiff was informed by defendant ATASCADERO STATE HOSPITAL that he had failed the physical examination. By letter dated March 31, 1978, defendant ATASCADERO informed

plaintiff that it was unable to hire him because of uncontrolled diabetes and lack of vision in one eye. The same letter stated that plaintiff's record had been forwarded to Dr. McGahey, Medical Officer of the State Personnel Board for review.

STATUTORY SCHEME

12. Section 504 of the Rehabilitation Act of 1973, as amended, 20 U.S.C. § 794, bans discrimination against qualified handicapped individuals on the basis of their handicap, under any program or activity receiving federal financial assistance.

13. Section 505 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. § 795 (P.L. 97-602) provides for enforcement of rights articulated in Section 504.

14. Section 1412 of the California Labor Code declares that the opportunity to seek, obtain and hold employment without discrimination on the basis of physical handicap is a civil right. Section 1420 declares it to be an unlawful employment practice for an employer to refuse to hire a person because of his physical handicap. Section 1422.2(b) authorizes civil suit in the Superior Courts of the State of California to enforce rights under the Fair Employment Practices Act.

15. Section 11135 of the California Government Code provides that no person shall be denied the benefits of or subjected to discrimination on the basis of physical handicap in any program or activity receiving state funds.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

16. On or about July 24, 1978, Plaintiff filed a complaint with the U.S. Department of Health, Education and Welfare alleging employment discrimination on the basis of physical handicap against Atascadero State Hospital. On or before May 4, 1979, HEW determined that defendant ATASCADERO STATE HOSPITAL had discriminated against Plaintiff in violation of § 504 of the Rehabilitation Act. HEW's attempts to obtain voluntary compliance have been unsuccessful. More than 180 days have elapsed since HEW made its finding that defendant ATASCADERO STATE HOSPITAL discriminated against Plaintiff; more than one year has elapsed since plaintiff filed his administrative complaint and he has secured no relief for his innuries.

17. On June 12, 1978, plaintiff filed a complaint with defendant ATASCADERO STATE HOSPITAL alleging employment discrimination on the basis of physical handicap in violation of California Labor Code § 1420 and 29 U.S.C. § 794.

18. On or about July 24, 1978, plaintiff filed a complaint with the Fair Employment Practices Commission, alleging employment discrimination by defendant ATASCADERO on the basis of his physical handicap in violation of California Labor Code § 1420.

19. On February 1, 1979, the Fair Employment Practices Commission issued a "right to sue" letter regarding plaintiff's complaint, entitling plaintiff to bring a civil action in Superior Court pursuant to California

Labor Code § 1422.2(b). Said civil action must be initiated within one year from the date on the letter.

20. On or about July 24, 1978, plaintiff filed a complaint with the State Personnel Board alleging employment discrimination on the basis of physical handicap against Atascadero State Hospital. On August 4, 1978, an employee of the State Personnel Board informed plaintiff's counsel that they should request a formal hearing before the State Personnel Board-Appeals Division; and that said request should include documentation that conciliation efforts with Atascadero State Hospital had been unsuccessful in resolving the complaint. Plaintiff requested a formal hearing pursuant to the State Personnel Board's instructions on September 7,

1978. No action has been taken on plaintiff's request.

21. California Government Code Section 1867.1 provides that the State Personnel Board's consideration and decision on appeals shall not exceed a six months period. Failure by the Board to render a timely decision constitutes exhaustion of administrative remedies.

NEED FOR DECLARATORY RELIEF

22. An actual controversy has arisen and now exists between plaintiff and defendants relating to their respective rights and duties. Plaintiff contends and defendant denies that plaintiff is fully qualified to perform the duties of a graduate student assistant despite his physical handicap violates 29 U.S.C. § 794, the California Fair Employment Practices Act, California Labor Code

§ 1420 et seq.; and California Government Code § 11135. Plaintiff desires a declaration of his rights with respect to this controversy.

NEED FOR INJUNCTIVE RELIEF

23. Plaintiff has been and continues to be irreparably harmed as a direct and proximate result of defendants acts in that he has been unable to complete the field experience requirement for his recreation administration degree for Cal State San Luis Obispo, his graduation has been delayed indefinitely, he has lost income and has been required to remain on Social Security Disability Insurance and he has been unable to obtain employment in his chosen profession. Plaintiff has no plain, speedy or adequate remedy at law for this harm.

FIRST CAUSE OF ACTION

24. Plaintiff incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 23 above.

25. 29 U.S.C. § 794 prohibits any program or activity which receives any financial assistance from the federal government, including those programs or activities of defendant, from discriminating against any person on the basis of his physical handicap.

26. Defendants' actions in refusing to hire plaintiff as a graduate student assistant were based on his physical handicap and therefore violated 29 U.S.C. § 794.

SECOND CAUSE OF ACTION

27. Plaintiff incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 23 above.

28. This cause of action involves a common nucleus of operative facts. Plaintiff requests the court to accept and exercise pendent jurisdiction for the convenience of the parties and the sound allocation of judicial resources.

29. Section 1420(a) of the California Labor Code provides, inter alia, that it shall be an unlawful employment practice for an employer to refuse to hire any person because of his physical handicap.

30. Defendants' actions in refusing to hire plaintiff as a graduate student assistant because of plaintiff's

physical handicaps violate California Labor Code § 1420(a).

THIRD CAUSE OF ACTION

31. Plaintiff incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 23 above.

32. This cause of action involves a common nucleus of operative facts. Plaintiff requests the court to accept and exercise pendent jurisdiction for the convenience of the parties and the sound allocation of judicial resources.

33. California Government Code § 11135 prohibits any program or activity which receives any financial assistance from the State of California, including those programs or activities of defendants, from discriminating against any person on the basis of his physical handicap.

34. Defendants' actions in refusing to hire plaintiff as a graduate student assistant were based on plaintiff's physical handicap and therefore violate California Government Code § 11135.

WHEREFORE, plaintiff prays that this Court:

1. Issue a preliminary and permanent injunction requiring defendants to employ plaintiff in a comparable position to the one for which he was rejected which will satisfy his field experience requirement for his recreation administration degree;

2. Declare that defendants' actions in refusing to hire plaintiff as a graduate student assistant violated 29 U.S.C. § 794, California Labor Code § 1420(a) and California Government Code § 11135.

3. Award plaintiff monetary damages for lost salary with interest, all fringe benefits and all civil service rights from the time that he would have been employed by for defendants' unlawful discrimination;

4. Award plaintiff any further compensatory damages;

5. Award plaintiff his costs in bringing this action;

6. Award plaintiff reasonable attorney's fees;

7. Award plaintiff such other relief
as the Court deems proper.

Dated: November 19, 1979

Respectfully submitted,

MARILYN HOLLE
MARY-LYNNE FISHER,
members of the
WESTERN LAW CENTER
FOR THE HANDICAPPED

by: _____
MARY-LYNNE FISHER

Attorneys for
Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 79 04523 MrP (Kx)

DOUGLAS JAMES SCANLON,

Plaintiff,

v.

ATASCADERO STATE HOSPITAL,
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,

Defendant.

TO: DOUGLAS JAMES SCANLON and his
attorney MARY-LYNNE FISHER:

PLEASE TAKE NOTICE that the
undersigned will move this court, in
Courtroom 20, United States Courthouse,
312 North Spring Street, Los Angeles,
California, on January 28, 1979, at 9:30
a.m., or as soon thereafter as counsel
may be heard, for an order pursuant to
Rule 12(b) of the Rules of Civil

Procedure dismissing said action on the grounds that:

1. The court lacks jurisdiction over the person of the named defendant.

2. The complaint fails to state a claim upon which relief can be granted.

This motion will be based upon the papers and files in said matter, the Notice of Motion and Points and Authorities in support thereof, and upon any matter of which the court may take judicial notice.

DATED: December 31, 1979

GEORGE DEUKMEJIAN,
Attorney General
ANNE S. PRESSMAN,
JAMES E. RYAN,
Deputy Attorneys General

By _____
JAMES E. RYAN
Deputy Attorney General
Attorneys for Defendant
State Department of Mental
Health, State of California

POINTS AND AUTHORITIES

I

PRELIMINARY STATEMENT

A. Facts

In brief, the instant Complaint for Violation of Civil Rights alleges that plaintiff is a sufferer of diabetes mellitus and diabetic retinopathy, the latter resulting in total loss of vision in one eye. (Complaint, ¶ 6.)

On or about February 6, 1978 plaintiff applied to defendant Atascadero State Hospital for a half-time position as a graduate student assistant in recreation therapy. (Complaint, ¶ 8.) After submission to a medical examination, plaintiff was denied said position. (Complaint, ¶ 10, 11.)

B. Theories of Recovery

Plaintiff contends that defendant's declination to employ him in the light of his medical and physical disabilities violates several laws pertaining to employment of the handicapped, to wit:

1. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). [A copy of this statute is annexed hereto as "Attachment A."] . . . First Cause of Action.

2. Section 1420(a) of the California Labor Code (Fair Employment Practices Act, Labor Code § 1411 et seq.) [A copy of section 1420(a) is annexed hereto as "Attachment B."] . . . Second Cause of Action.

3. Section 11135 of the California Government Code. [A copy of this section is annexed hereto as

"Attachment C."] . . . Third Cause of Action.

C. Relief Sought

Under each of his three purported causes of action plaintiff seeks (a) retrospective and prospective compensatory damages, (b) mandatory injunctive relief and (c) declaratory judgment.

D. Bases for Federal Jurisdiction

Plaintiff relies on four grounds for satisfaction of federal jurisdictional requirements: (a) 28 U.S.C., section 1331(a), (b) 28 U.S.C., section 1343(3) and (4), (c) 29 U.S.C., sections 794 and 795, and (d) 28 U.S.C., sections 2201 and 2202.

Plaintiff concedes (Complaint, para. 28, 32) that for jurisdictional purposes the alleged SECOND and THIRD causes of

action rest solely on the permissive doctrine of pendent jurisdiction.

II

THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BARS SUIT IN FEDERAL COURT AGAINST THE STATE OF CALIFORNIA AND ITS DEPARTMENTS

In 1973 the United States Supreme Court reaffirmed the rule that suit in federal court by a private party seeking to impose a liability which must be paid from state treasury funds is barred by the Eleventh Amendment. (Edelman v. Jordan, 415 U.S. 651.)

That case was a class action for injunctive and declaratory relief pertaining to what plaintiffs claimed were improper practices by state officials in administering the federal-state programs of Aid to the Aged, Blind and Disabled. The named defendants were

the state officials who were alleged to have engaged in such practices. Neither the involved state nor any of its agencies were parties.

The district court issued a permanent injunction requiring not only prospective compliance with federal program requirements but also ordering the defendant officials to remit benefits retroactive for almost three years to otherwise eligible applicants. On appeal, the Circuit Court affirmed.

The Supreme Court granted certiorari and reversed, holding that the retroactive award of benefits was barred by the Eleventh Amendment, which reads:

"The judicial power of
the United States shall not
be construed to extend to

any suit in law or equity,
commenced or prosecuted
against one of the United
States by citizens of
another State, or by
citizens or subjects of any
foreign State."

The immunity provided by the
Amendment has been extended consistently
to bar suits brought in federal courts
by a state's own citizens as well as by
citizens of another state. (See, e.g.,
Employees v. Missouri Public Health
Department (1973) 411 U.S. 279.)

The court granted certiorari in
Edelman in order to resolve apparent
confusion over the continuing vitality
of states' sovereign immunity under the
Eleventh Amendment. Consequently, in an

effort to dispel any such doubt the Court iterated in succinct fashion:

"Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. (Citing cases.)" (Insert added.)
(415 U.S. at p. 663.)

Even though the State of California, per se, is not a named defendant in the present case, the Court in Edelman laid to rest any attempted form-over-substance argument based on the titular designation of a defendant:

"It is also well established that even

though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury 323 U.S. 459 (1945), the Court said: 'When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Id., at p. 464." (415 U.S. at p. 663.)

Of course, a state can waive its sovereign immunity but the Edelman decision is instructive on this point also.

"In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or 'by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" (415 U.S. at p. 673.)

While plaintiff at bar alleges (Complaint, para. 5) that defendant Atascadero State Hospital is a recipient

of federal financial assistance under the federal Rehabilitation Act, that fact or allegation alone is not sufficient to constitute a waiver of immunity.

"The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." (Id., at p. 673.)

Lastly, in Edelman the Court upheld the prospective injunctive relief portion of the district court's judgment

insofar as it compelled state officials to amend their practices. The Court was careful, however, to point out that the availability of a remedy in prospective relief against officials did not create a concomitant right against the State itself. (415 U.S. at pp. 676-677.)

This latter principle was made abundantly clear by the Supreme Court's opinion in Alabama v. Pugh, (1978) 438 U.S. 781. There, the district court had issued a mandatory injunction against the State of Alabama and its Board of Corrections, together with a number of state prison officials, ordering the adoption of various measures designed to eradicate alleged cruel practices in prison.

In reversing that portion of the lower court's injunction as it related

to the State of Alabama and its Board and ordering dismissal of those two defendants, the Court stated simply:

"There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. (Citing Edelman, supra, and others.)" (Insert added.)
(438 U.S. at p. 782.)

Notwithstanding the treatise on the sovereign immunity issue provided by the Edelman v. Jordan, supra, decision, and the terse recapitulation thereof in Alabama v. Pugh, supra, the Supreme Court nevertheless found it necessary

just nine months ago to again restate the viability and breadth of the immunity doctrine.¹

In Quern v. Jordan, (1979) 440 U.S. 332, sub nom. Edelman v. Jordan, the defendant state officials had been ordered on remand to send notices to past applicants for aid informing them that state administrative remedies existed to determine if such applicants had been wrongfully denied benefits. Since the effect of such a notice would impact state treasury funds, the officials argued that the new order violated the Eleventh Amendment and Edelman v. Jordan, supra.

1/ This need was apparently occasioned by recent efforts at misapplication of the decision in Monell v. New York City Dept. of Social Services, (1978) 436 U.S. 658, wherein it was held that a City could not don the cloak of immunity furnished by the Eleventh Amendment.

While recognizing that the new order-notice might well create liability against the state treasury, the Supreme Court refused to dissolve it, explaining that the entitlement to and amount of any monetary liability would be the result of state not federal court action. (440 U.S. at p. 348.) Before proceeding to dispose of the foregoing issue, the Court made certain that its holding in Edelman and its ilk remain unaltered:

"...[R]espondent suggests that our decision in Edelman has been eviscerated by later decisions such as Monell v. City of New York Dept. of Social Services, (1978) 436 U.S. 658... As we have noted above, we held in Edelman that

in 'a [42 U.S.C.] § 1983 action... a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, Ex Parte Young, supra, and may not include a retroactive award which requires the payment of funds from the state treasury, Ford Motor Co. v. Department of Treasury, supra.' 415 U.S., at 677. We disagree with respondent's suggestion. This Court's holding in Monell was 'limited to local government units which are not considered part of the State for Eleventh Amendment purposes,' 436 U.S.,

at 690 n. 54, and our Eleventh Amendment decisions subsequent to Edelman and to Monell have cast no doubt on our holding in Edelman. See Alabama v. Pugh, (1978) 438 U.S. 781" (440 U.S. at pp. 338-339.)

Moreover, while there are instances when a state may have waived its sovereign immunity or may be deemed to have consented to suit in federal court, plaintiff in the case at bar can point to no such circumstance. Plaintiff's only alleged federal claim is founded upon a purported violation of 29 U.S.C. section 794. (See "Attachment A.") 29 U.S.C. section 794a (a) (2) (a copy of which is annexed hereto as "Attachment D") provides, inter alia, that a person aggrieved under section 794 shall have

available to him/her the remedies set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, et seq.). (A copy of 42 U.S.C. § 2000d is annexed hereto as "Attachment E.") Since plaintiff's litigation rights in federal court rest on Title VI, then, it would be necessary for him to demonstrate that California has waived its Eleventh Amendment immunity for purposes of Title VI actions or that this shield has been abrogated by Congressional enactment.

Courts historically have looked at the specific piece of civil rights legislation in question to determine the availability of a remedy in federal courts against states. In keeping with the caveat in Edelman, however, that a waiver of immunity will be found only

where stated in the most express language or compelled by overwhelming implication (415 U.S. at p. 673), courts have been loathe to find such waiver and, in fact, have refused to do so. (See, e.g., Edelman v. Jordan, supra [42 U.S.C. § 1983]; Employees v. Missouri Public Health Dept., 411 U.S.C. 279 (1973) [re 29 U.S.C. §§ 201-219]; Boreta v. Kirby, 328 F.Supp. 670 (1971, N.D. Cal.) [re 42 U.S.C. §§ 1383 and 1385].)

One instance in which the Eleventh Amendment provided no bar to suit arose in Fitzpatrick v. Bitzer (1975) 427 U.S. 445. That case involved a class action employment discrimination claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.) against the director of Connecticut's State Employees Retirement System in

which plaintiffs sought, among other things, an award of retroactive retirement benefits. The director (state) unsuccessfully urged sovereign immunity under the Eleventh Amendment and cited Edelman v. Jordan, supra, in support thereof. The immunity argument failed in the context of this case, however, in view of express language found in 42 U.S.C. section 2000e(a). (A copy of 42 U.S.C. § 2000e(a) is annexed hereto as "Attachment F.") That subsection of Title VII specifically includes governmental agencies, etc., within the definition of "persons" against whom employment discrimination actions may be brought. This creation of new state liability was effected by § 2 (1) of the Equal Employment Opportunity Act of 1972 (86 Stat.

103.) The Court in Fitzpatrick then found that the power of Congress to subject states to liability pursuant to section 5 of the Fourteenth Amendment supersedes and abrogates any sovereign immunity provided by the Eleventh Amendment.

In contrast, there is no such language contained in the Civil Rights legislation, Title VI, here at issue. 42 U.S.C. section 2000d (see "Attachment E") retains its original language with respect to the class of potential defendants. All of the cases which have considered the question of whether states or their departments are proper parties defendant in Title VI federal court actions have adhered to the doctrine of sovereign immunity under the Eleventh Amendment. (See Wade v. Mississippi Co-Op. Extension Service,

528 F.2d 508 (1976 5th Cir.), on remand
424 F.Supp. 1242 (1976, N. D. Miss.);
Gilliam v. City of Omaha, 388 F.Supp.
842 (1975, D. Neb.).

Furthermore, the overwhelming
implication with regard to Title VI
suits is that states and their agencies
are not intended to be defendants in
such private actions in federal court.
This inference is compelled by the fact
that had Congress intended otherwise it
could have (a) amended 42 U.S.C. section
2000d, as it did section 2000e, to
expressly include state governmental
entities within the scope of proper
defendants, or (b) provided for state
liability in the original or amendatory
language of 29 U.S.C. section 794a
(a)(2), or (c) chosen to avail parties
aggrieved under section 794a of the

broader remedies of Title VII rather than the restrictive scope of Title VI.

In summary, therefore, in the light of the Eleventh Amendment and the continued embracing of its immunity in Edelman, Pugh and Quern, plaintiff has not and cannot state a claim, whether in monetary, injunctive or declaratory relief, against the State of California, its Department of Mental Health, or Atascadero State Hospital.

III

PLAINTIFF HAS FAILED TO PLEAD AN ESSENTIAL ELEMENT OF A CAUSE OF ACTION UNDER 29 U.S.C. 794

Defendant recognizes that actions under the federal rehabilitation act of 1973 (29 U.S.C. § 794a) are in an embryonic stage. Nevertheless, one case has delineated at least one of the requirements for successfully pleading a

cause of action under the Act. In Trageser v. Libbie Rehab. Center, Inc., 590 F.2d 87 (1978, 4th Cir.), cert. den. 99 S.Ct. 2985, it was held:

"A private action under § 504 to redress employment discrimination therefore may not be maintained unless a primary objective of the federal financial assistance is to provide employment. There has been no such allegation in this case; nor could there be one." (Emphasis added.)

590 F.2d, p. 89.

The court in Trageser based the above holding on the language found in section 604 of Title VI (42 U.S.C. § 2000d-3, a copy of which is annexed hereto as Attachment G), which provides:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

Other than the mere assertion in paragraph 5 of the complaint that defendant "is a recipient of federal financial assistance," plaintiff makes no reference as to the nature of such assistance and, specifically, does not

allege that the purpose of such assistance is to provide employment. Consequently, as in Trageser, supra, plaintiff's claim under 29 U.S.C. section 794a should be dismissed.

IV

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this Court order the within action dismissed in its entirety.

DATED: December 31, 1979

GEORGE DEUKMEJIAN,
Attorney General
ANNE S. PRESSMAN,
JAMES E. RYAN,
Deputy Attorneys General

By _____
JAMES E. RYAN
Deputy Attorney General
Attorneys for Defendant
State Department of Mental
Health, State of California

[Attachments and jurat omitted.]

JAN 18 1985

ALEXANDER CASTEVAS,
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1984

ATASCADERO STATE HOSPITAL
AND
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
PETITIONERS

v.

DOUGLAS JAMES SCANLON

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING REVERSAL

REX E. LEE

Solicitor General

WM. BRADFORD REYNOLDS

Assistant Attorney General

CHARLES FRIED

*Special Assistant to the
Attorney General*

CHARLES J. COOPER

*Deputy Assistant Attorney
General*

CHRISTOPHER J. WRIGHT

*Assistant to the Solicitor
General*

WALTER W. BARNETT

DAVID K. FLYNN

*Attorneys**Department of Justice
Washington, D.C. 20530
(202) 633-2217*

QUESTION PRESENTED

Whether Congress intended to abrogate the Eleventh Amendment immunity of a state that accepts federal funds under Section 504 of the Rehabilitation Act.

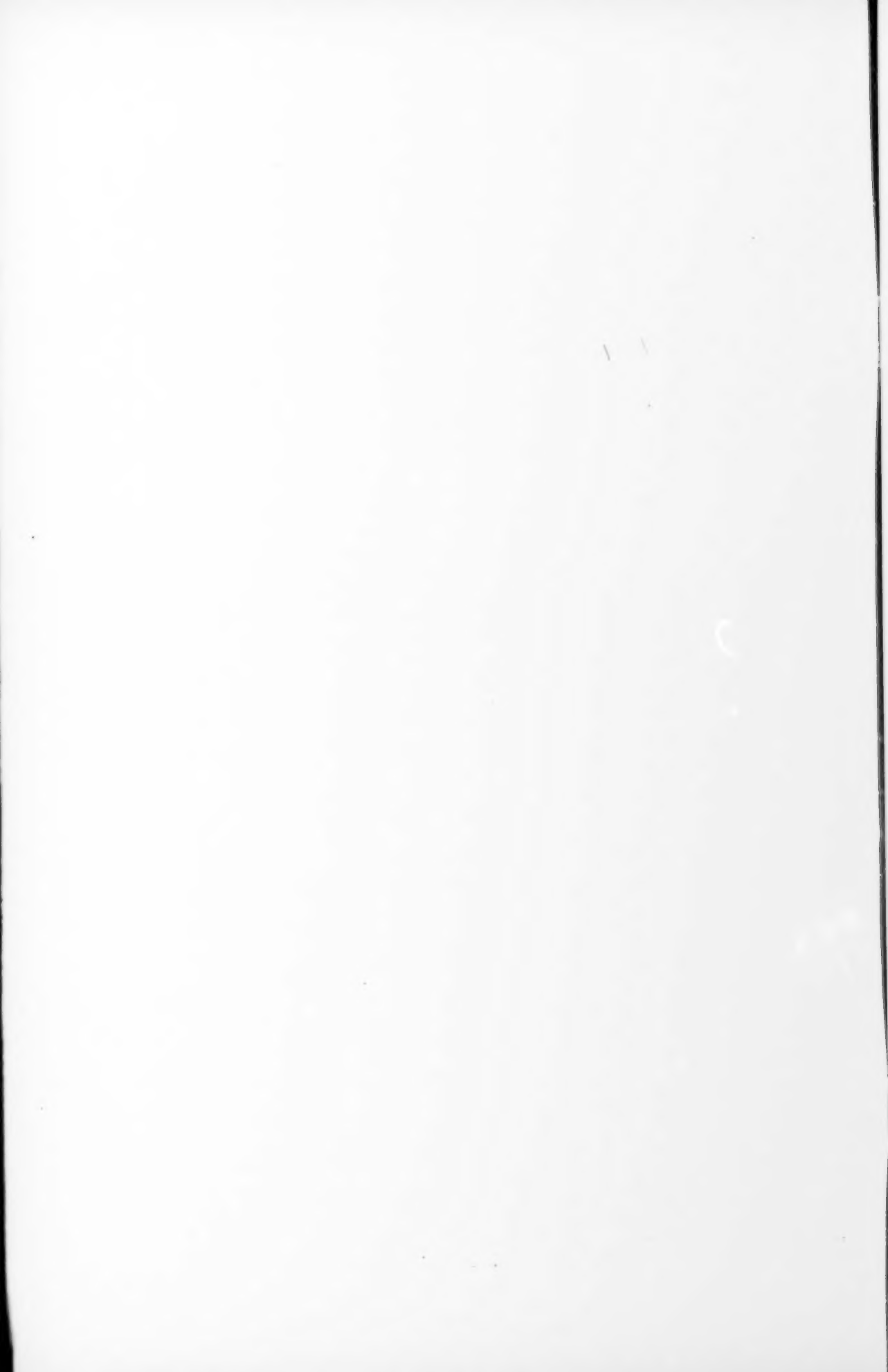


TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Summary of argument	5
 Argument:	
The Eleventh Amendment bars federal courts from entertaining private damage suits against the states under Section 504 of the Rehabilitation Act	7
Conclusion	18

TABLE OF AUTHORITIES

Cases:

<i>Cannon v. University of Chicago</i> , 441 U.S. 677	13
<i>Chisholm v. Georgia</i> , 2 U.S. (2 Dall.) 419	7, 8
<i>Ciampa v. Massachusetts Rehabilitation Comm'n</i> , 718 F.2d 1	2, 3, 5, 14, 17
<i>Consolidated Rail Corp. v. Darrone</i> , No. 82-862 (Feb. 28, 1984)	3, 4, 13, 14
<i>Edelman v. Jordan</i> , 415 U.S. 651	2, 7, 12, 16
<i>Employees v. Department of Public Health</i> , 411 U.S. 279	10, 11, 16
<i>Fitzpatrick v. Bitzer</i> , 427 U.S. 445	9
<i>Florida Department of Health & Rehabilitation Services v. Florida Nursing Home Ass'n</i> , 450 U.S. 147	12

IV

Page

Cases—Continued:

<i>Ford Motor Co. v. Department of Treasury</i> , 323 U.S. 459	8
<i>Guardians Ass'n v. Civil Service Commission</i> , No. 81-431 (July 1, 1983)	14
<i>Hans v. Louisiana</i> , 134 U.S. 1	8
<i>Hutto v. Finney</i> , 437 U.S. 678	9, 10, 12, 15
<i>Jones v. Illinois Department of Rehabilitation Services</i> , 504 F. Supp. 1244, modified, 689 F.2d 724	17
<i>Miener v. Missouri</i> , 673 F.2d 969	5
<i>Moreno v. Texas Southern University</i> , 573 F. Supp. 73	14
<i>Murray v. Wilson Distilling Co.</i> , 213 U.S. 151	12
<i>Parden v. Terminal Ry.</i> , 377 U.S. 184	9, 11
<i>Pennhurst State School & Hospital v. Halderman</i> , No. 81-2101 (Jan. 23, 1984)	3, 8, 10, 12, 15
<i>Petty v. Tennessee-Missouri Bridge Comm'n</i> , 359 U.S. 275	11, 12
<i>State of New York No. 1, Ex parte</i> , 256 U.S. 490	8
<i>Quern v. Jordan</i> , 440 U.S. 332	10, 12
<i>United States v. Testan</i> , 424 U.S. 392	16
<i>Vanstophorst v. Maryland</i> , 2 U.S. (2 Dall.) 401	7

Cases—Continued:

Virginia, Ex parte, 100 U.S. 339 9

Young, Ex parte, 209 U.S. 123 16

Constitution, statutes and regulation:

U.S. Const. :

Art. I, § 8, Cl. 3 (Commerce Clause) 9

Amend. XI *passim*

Amend. XIV 9

Amend. XIV, § 5 9

Civil Rights Act of 1964, Tit. VI, 42 U.S.C.

2000d *et seq.* 13, 14, 15, 17

Rehabilitation Act of 1973, 29 U.S.C.

790 *et seq.* :

§ 501, 29 U.S.C. 791 16

§ 504, 29 U.S.C. 794 *passim*

§ 505, 29 U.S.C. 794a 2, 6, 15

§ 505(a)(1), 29 U.S.C.

794a(a)(1) 16

§ 505(a)(2), 29 U.S.C.

794a(a)(2) 4, 5, 13, 15, 16, 17

§ 505(b), 29 U.S.C. 794a(b) 15, 16

45 C.F.R. 84.3(f) 5

VI

Page

Miscellaneous:

124 Cong. Rec. 30347 (1978)	15
3 <i>Elliott's Debates</i> (1836)	7
The Federalist No. 81 (A. Hamilton)	7
S. Rep. 95-890, 95th Cong. 2d Sess. (1978)	16
S. Rep. 96-316, 96 Cong. 1st Sess. (1979)	14
1 C. Warren, <i>The Supreme Court in United States History</i> (rev. 1937)	7

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-351

ATASCADERO STATE HOSPITAL
AND
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
PETITIONERS

v.

DOUGLAS JAMES SCANLON

*ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING REVERSAL**

INTEREST OF THE UNITED STATES

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance."¹ At issue in this case is whether a private plaintiff

¹Section 504 provides, in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

alleging a violation of Section 504 may bring suit against a state seeking retrospective relief in the federal courts, or whether such a suit is barred by the Eleventh Amendment.

The United States has responsibility for enforcement of the equal employment provisions of the Rehabilitation Act.² The Court's decision in this case will not directly affect federal enforcement actions, since "the Eleventh Amendment [is] no bar to a suit by the United States against a State." *Edelman v. Jordan*, 415 U.S. 651, 669 (1974). Nevertheless, when this case first came before the court of appeals in 1980, the United States filed a brief as amicus curiae supporting the conclusion that the Eleventh Amendment did not bar this plaintiff's suit. That brief argued that "congressional intent to make states amenable to suit under Section 504 can be gleaned from the framework of the statute, its legislative history and the statutory purpose" (C. A. Br. 32).

We are convinced that our prior position was incorrect. Since our earlier brief the only other court of appeals that has squarely addressed the issue presented here held that Congress did not clearly intend to abrogate states' Eleventh Amendment immunity (*Ciampa v. Massachusetts Rehabilitation Comm'n*, 718 F.2d 1 (1st Cir. 1983)). Furthermore, this Court's decision last Term in *Pennhurst State*

²The remedial provisions of the Act, Section 505 (29 U.S.C. 794a), provide, in pertinent part:

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

School & Hospital v. Halderman, No. 81-2101 (Jan. 23, 1984), reaffirmed the standard used in *Ciampa*. And finally, this Court's decision last Term in *Consolidated Rail Corp. v. Darrone*, No. 82-862 (Feb. 28, 1984), which construed Section 504, shows that clear congressional intent to abrogate states' Eleventh Amendment immunity is lacking. A state's Eleventh Amendment immunity cannot be abrogated by congressional intent that is gleaned from the statute and its legislative history. Because the Eleventh Amendment represents a fundamental principle of allocation of power in our federal system, Congress should be taken to have abrogated states' immunity only by a clear and explicit expression of intent. This most exigent standard of explicit abrogation has not been met in this case.

STATEMENT

Respondent Douglas J. Scanlon suffers from diabetes mellitus and loss of vision in one eye. On November 21, 1979, he commenced suit against petitioner Atascadero State Hospital under Section 504 of the Rehabilitation Act of 1973 in the District Court for the Central District of California alleging that the Hospital denied him employment solely because of his physical disabilities. He claimed that the Hospital, which has received federal financial assistance under Section 504, violated that statute by denying him employment. He sought monetary, injunctive, and declaratory relief (Pet. App. 2a). The Hospital and the California Department of Mental Health, which operates the facility, moved to dismiss the action on two grounds: (1) that the Eleventh Amendment barred plaintiff's action; and (2) that plaintiff had failed to allege that the federal assistance received by petitioners was for the primary purpose of providing employment (*ibid.*).

The district court granted defendants' motion to dismiss the complaint, holding that the state agencies were protected by the Eleventh Amendment's grant of immunity

(Pet. App. 23a). The court rejected defendants' second ground for dismissal (Pet. App. 24a). The Ninth Circuit affirmed, but on the ground that "a private action under [Section 504] to redress employment discrimination cannot be maintained unless the primary objective of the federal financial assistance is to provide employment" (Pet. App. 9a). The court did not reach the Eleventh Amendment question at that time (Pet. App. 7a).

In November of 1982, plaintiff petitioned this Court for a writ of certiorari (No. 82-5812) to determine whether the federal financial assistance received by an employer must be for the primary purpose of providing employment to subject that employer to suit for employment discrimination under Section 504. The Court held the case while it considered *Consolidated Rail Corp. v. Darrone*, No. 82-862. On February 28, 1984, the Court held in *Darrone* that an employer could be sued under Section 504 regardless of the purpose of the federal financial assistance it had received. Consequently, on March 19, 1984, the Court granted plaintiff's petition for a writ of certiorari, vacated the court of appeals' decision, and remanded the matter for further consideration in light of the *Darrone* opinion.

On remand, the court of appeals found *Darrone* controlling with respect to the issue it had previously decided and contrary to its decision (Pet. App. 2a). Accordingly, the court proceeded to address the Eleventh Amendment question. The court recognized that the Eleventh Amendment "broadly bars federal court actions by private parties * * * against states and state agencies" (Pet. App. 3a). It further recognized that the Rehabilitation Act does not expressly provide for state liability and its legislative history does not make clear that Congress intended to make states liable (*ibid.*). Nevertheless, the court found that Congress had abrogated Eleventh Amendment immunity (*ibid.*). Its conclusion was based on the fact that Section 505(a)(2) of

the Act, 29 U.S.C. 794a(a)(2), provides for remedies against "any recipient of Federal assistance" and, therefore, states are literally included in the definition (Pet. App. 3a).³ The court reversed the district court and remanded the matter for further proceedings (Pet. App. 5a).⁴

SUMMARY OF ARGUMENT

The immunity of states from private damage suits brought in federal courts is a fundamental constitutional guarantee of state sovereignty that underlies our federal system. While Congress may require states to waive their immunity as a condition of receiving federal funds, decisions of this Court make clear that it is essential that there be an unequivocal expression of congressional intent to abrogate states' Eleventh Amendment immunity before states will be held to have waived that immunity. Such an unequivocal expression may be found in a congressional mandate explicitly and in terms abrogating states' immunity from suit. Sometimes, however, Congress will subject to suit a broad class of entities — *e.g.*, "any recipient" — and states will fall into the literal meaning of that class definition. Such a general inclusion is not enough to constitute abrogation of the fundamental Eleventh Amendment

³The court noted that the regulations implementing the Act, 45 C.F.R. 84.3(f), define "recipient" to include "any state or its political subdivision" (Pet. App. 3a).

⁴The court of appeals recognized that its decision conflicted with *Ciampa v. Massachusetts Rehabilitation Comm'n*, 718 F.2d 1 (1st Cir. 1983), and *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982), and merely stated that it declined to follow those cases (Pet. App. 5a). While the First Circuit's decision in *Ciampa* is on point and contrary to the Ninth Circuit's holding, it is not clear that the Eighth Circuit decision is relevant. Although *Miener* involved the Rehabilitation Act, the court, in addressing the Eleventh Amendment question, referred only to the Education Act, 20 U.S.C. 1401 *et seq.* ("we have found no evidence in the legislative history that the Education Act was intended by Congress to abrogate the states' immunity" (673 F.2d at 981)).

immunity. There must be more to show that the apparent inclusion within a general class represented a focused congressional intention to include the states within that classification, and remove their Eleventh Amendment protection. This is because states, unlike other general members of a class, have a distinct role in our federal structure of government, and should not by inference alone be assumed to have been stripped of their sovereign and primary responsibility for the welfare of their citizens. The necessary showing of such a fundamental abrogation of state prerogatives may be supplied by legislative history, but only of the most focused, explicit, determinative kind.

Congress has not clearly expressed its intent to require states that receive funds under Section 504 to waive their Eleventh Amendment immunity. In this case there is literal reference to the states only by the designation in Section 504 of "any recipient" of federal aid, but states are not just "any" recipient. They are recipients with special constitutional responsibilities and prerogatives. Nor is the requisite specificity supplied by the legislative history. There is no evidence that Congress considered making states liable for damages in federal court actions brought by private parties. Rather, the legislative history shows only that the sponsors of Section 505, the remedial provision added in 1978, intended the 1978 amendments' attorney's fees provisions to apply against the states. This is a distinct and understandable concern, since *prospective* suits under Section 504 are a significant means for assuring compliance by the states, and the Eleventh Amendment does not bar such suits. Congress's intention to provide for attorney's fees to prevailing parties is very far from the necessary focused showing of a congressional intent to subject state treasuries to substantive liability for retrospective damages under the Act.

ARGUMENT

THE ELEVENTH AMENDMENT BARS FEDERAL COURTS FROM ENTERTAINING PRIVATE DAMAGE SUITS AGAINST THE STATES UNDER SECTION 504 OF THE REHABILITATION ACT

1. The question whether the federal courts may entertain private suits against the states is not new. It was a subject of active debate during the formation of our Republic. Only after the power of the federal courts to entertain such suits was disclaimed by advocates of the new federal government was the Constitution adopted. See *Edelman v. Jordan*, 415 U.S. 651, 660-662 & n.9 (1974) (citing 1 C. Warren, *The Supreme Court in United States History* 91 (rev. 1937); 3 *Elliott's Debates* 533, 557 (1836); and *The Federalist* No. 81 (A. Hamilton)). But the very first suit in the federal courts was brought by a foreign firm against the State of Maryland (*Vanstophorst v. Maryland*, see 2 U.S. (2 Dall.) 401 (1791); 1 C. Warren *supra*, at 91 n.1). After the institution of several similar suits against other states, the issue whether federal judicial power extended to such a case was presented squarely in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that the states were subject to suits in the federal courts brought by citizens of another state or foreign country.

The *Chisholm* decision generated great controversy. In just five years, strong opposition to the rule announced in *Chisholm* led to the adoption of the Eleventh Amendment, which provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

While the terms of the Eleventh Amendment do not specifically mention suits by a state's own citizens, it has long been clear that an unconsenting state is immune from suits

brought in federal courts by its own citizens as well as by citizens of another state or a foreign nation. *Hans v. Louisiana*, 134 U.S. 1 (1890). This is because, while the Eleventh Amendment “overruled the particular result in *Chisholm*, * * * its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III” (*Pennhurst State School & Hospital v. Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 7). Ratification of the Amendment thus confirmed that the original delegation of judicial power made by the Constitution prohibited suits against the states in federal courts without their permission.

That the states’ Eleventh Amendment immunity is a fundamental constitutional precept underlying our federal structure was reiterated recently by this Court in *Pennhurst* (slip op. 7-8, quoting *Ex parte State of New York No. 1*, 256 U.S. 490, 497 (1921) (emphasis in *Pennhurst*)):

That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this Court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.*

Accordingly, a state’s constitutional immunity is of “such compelling force” as to be a jurisdictional limitation which may be asserted at any point during litigation in which a state is a real party in interest. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 467 (1945). In sum, the Eleventh Amendment’s grant of immunity is a fundamental constitutional underpinning of the relationship between the federal government and the states.

2. While fundamental, the Eleventh Amendment immunity of the states is not absolute. The Civil War Amendments are “ ‘limitations of the power of the States and enlargements of the power of Congress’ ” (*Fitzpatrick v. Bitzer*, 427 U.S. 445, 454 (1976), quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880)). Section 5 of the Fourteenth Amendment provides that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” The Court has held that “the Eleventh Amendment, and the principle of state sovereignty which it embodies * * *, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment” (*Fitzpatrick v. Bitzer*, 427 U.S. at 456). Thus, when Congress acts pursuant to the Fourteenth Amendment, it may abrogate states’ Eleventh Amendment immunity. Congress also has power to abrogate state immunity under other provisions of the Constitution, including the Commerce Clause (*Parden v. Terminal Ry.*, 377 U.S. 184, 191-192 (1964)).⁵

The issue in this case is how clear Congress must be when it abrogates states’ Eleventh Amendment immunity. The court of appeals found that the literal inclusion of states within the term “any recipient” is sufficient to abrogate states’ Eleventh Amendment immunity. This Court has made clear, however, that a much stricter standard applies. In *Hutto v. Finney*, 437 U.S. 678, 698 n.31 (1978), for example, the Court found that the Civil Rights Attorneys Fees Awards Act of 1976 “has a history focusing directly on the question of state liability; Congress considered and firmly rejected the suggestion that States should be immune

⁵The parties agreed that Congress enacted Section 504 of the Rehabilitation Act pursuant to its power under Section 5 of the Fourteenth Amendment (C.A. Br. 31 n.27). Congressional power to enact Section 504 also rests on the spending power. Since congressional intent to abrogate Eleventh Amendment immunity is required regardless of the basis of Congress’s power, and is not present here, the Court need not decide the constitutional source of that power.

from fee awards." The Court distinguished *Hutto v. Finney* in *Quern v. Jordan*, 440 U.S. 332, 345 (1979), where it concluded that 42 U.S.C. 1983 "does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States." And last Term, in *Pennhurst*, slip op. 8, the Court restated the rule that, while "Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, * * * we have required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.' "

The decision in *Employees v. Department of Public Health*, 411 U.S. 279 (1973), illustrates how these principles should be applied in a factual setting that is nearly identical to this case. The plaintiffs in *Employees*, who worked in state health facilities, sought damages for overtime compensation due them under the Fair Labor Standards Act. The definition of "employer" under the Act originally excluded states. But a 1966 amendment to the definition provided that states were "employers" with respect to employees in state health facilities. Thus, the Court held, under "the literal language of the present Act, Missouri and the departments joined as defendants are constitutionally covered by the Act" (411 U.S. at 283). But that did not answer the question "whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court" (*ibid*). The Court held that literal inclusion of the states in the definition of "employer" under the Act was not enough to abrogate states' Eleventh Amendment immunity, since "Congress, acting responsibly, would not be presumed to take such action silently" (411 U.S. at

284-285). The Court “found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen * * * to sue the State in the federal courts” (*id.* at 285). Under *Employees*, therefore, it is clear that a general inclusion of states within a broad category of defendants is not enough to abrogate their Eleventh Amendment immunity. Rather, clear evidence of a focused congressional intention on states’ Eleventh Amendment immunity is required.

The Court in *Employees* specifically addressed the federal government’s argument that such a holding rendered the amendments “meaningless” and provided “a right without a remedy” (411 U.S. at 285-287). The government’s argument was based on the contention that the agency empowered to enforce the Act could not, without the supplement of private federal court suits against the states, effectively provide assistance to the 45.4 million employees covered by the Act, especially since it was not clear that state courts would entertain private damage actions. Despite these problems, the Court refused to put “the States on the same footing as other employers,” since Congress had not clearly shown its intention to abrogate their Eleventh Amendment immunity.⁶

⁶The Ninth Circuit did not cite *Employees* in its decision in this case. It relied instead on *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), and *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275 (1959).

In *Parden*, the Court found the Federal Employers’ Liability Act, which provides that “[e]very common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier” and that “an action may be brought in a district court of the United States” (45 U.S.C. 51, 56), had abrogated the Eleventh Amendment immunity of a railroad operated by Alabama. *Parden* may be distinguished on the ground that the Act specifically provided for private actions in federal courts (see pages 13-16, *infra*). It is also arguable, as Justice Brennan, the author of the Court’s opinion in *Parden*, argued in dissent in *Employees*, that *Parden* cannot really be

Finally, it is clear that a State does not waive its Eleventh Amendment immunity merely by receiving federal funds. *Florida Department of Health & Rehabilitation Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); *Edelman v. Jordan*, 415 U.S. 651 (1974). Indeed, given the multiplicity of such federal programs, any such implied waiver would leave little scope for the special responsibilities and prerogatives reserved to the states under the Eleventh Amendment. In the *Florida Nursing Home* decision, the Court rejected an argument that, by receiving federal funds and agreeing to be bound by federal law, the state had waived its immunity. The Court relied on *Edelman*, which stated that "[i]n deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction' " (415 U.S. at 673; quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). The Court held that "[t]he mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts" (415 U.S. at 673). Thus, in the

squared with *Employees* (411 U.S. at 298-308). It is certainly difficult to conclude that the mere literal inclusion of a state-run railroad in the class of potential defendants in damage actions in federal courts is the type of clear and unequivocal abrogation of Eleventh Amendment immunity required by *Hutto v. Finney*, *supra*, *Quern v. Jordan* *supra*, and *Pennhurst*.

Petty is clearly distinguishable. The Court construed a clause in an interstate compact, which expressly provided that the compact did not diminish the power of federal courts, as a waiver of a state's immunity from a suit brought by an employee of an interstate carrier formed under the compact (359 U.S. at 277-278). There is simply no such waiver here (see pages 12-13, *infra*).

congressional authorization to abrogate the Eleventh Amendment immunity of state recipients of funds under the Rehabilitation Act, a state does not waive its immunity merely by receipt of such funds.

3. The question is whether Congress clearly and unequivocally expressed an intention to abrogate states' Eleventh Amendment immunity when it adopted the Rehabilitation Act. This Court reviewed the history and purpose of the Act last Term in *Consolidated Rail Corp. v. Darrone*, No. 82-862 (Feb. 28, 1984). In that case a plaintiff alleged that a private employer that received federal financial assistance had violated rights conferred by Section 504. He sought damages under Section 505(a)(2) of the Act. As the court noted, Section 504, as adopted in 1974, did not provide any express remedies. The Act was amended in 1978 to provide, in Section 505(a)(2) (see note 2, *supra*), that the remedies "set forth in title VI of the Civil Rights Act of 1964 * * * shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance" under Section 504. Thus, Congress decided in 1978 that the remedies available to enforce Section 504 are the same as those then thought to be available under Title VI. However, critical questions concerning the nature of the Title VI remedies had not yet been decided in 1978.

Among those questions was whether there existed any private right of action at all under Title VI. This issue was addressed the next year in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The precise issue in *Cannon* was whether a private right of action against a private party exists under Title IX, the remedial provisions of which also incorporate the remedies of Title VI. The Court held that, since a number of federal courts had found that a private right of action exists under Title VI at the time Title IX was adopted, that Congress must have assumed that a similar private right of action exists under Title VI and hence under

Title IX as well (441 U.S. at 696). In *Darrone*, the Court last Term assumed that a similar private right of action against a private party exists under Section 504 of the Rehabilitation Act (slip op. 5 & n.7).

Another unanswered question in 1978 was whether retrospective relief was available to private plaintiffs under Title VI. In 1983, in *Guardians Ass'n v. Civil Service Commission*, No. 81-431 (July 1, 1983), a majority of the Court held that a private plaintiff under Title VI could recover backpay (see *Darrone*, slip op. 5-6 & n.9).⁷ In *Darrone*, the Court similarly held that backpay was available under Section 504 against a private party (slip op. 6).⁸ The federal courts previously had been in conflict on this issue (see *Ciampa v. Massachusetts Rehabilitation Comm'n*, 718 F.2d 1, 5 (1st Cir. 1983)). It should be emphasized that neither the defendant in *Guardians Ass'n* nor *Darrone* was a state agency protected by the Eleventh Amendment.⁹

⁷In *Moreno v. Texas Southern University*, 573 F. Supp. 73 (S.D. Tex. 1983), the court, after noting "[s]urprisingly, there is a dearth of case law on the issue of whether damages may be awarded against any party under Title VI" (*id.* at 76), and reviewing the opinions in *Guardians Ass'n*, held that, because of Eleventh Amendment concerns, "the plaintiff is limited to equitable relief for his Title VI claims" (*id.* at 77).

⁸In holding in *Darrone* that the plaintiff "may recover backpay in the present § 504 suit" (slip op. 6), the Court noted that "statements made in relation to subsequent legislation * * * endorse the availability of backpay," citing S. Rep. 96-316, 96 Cong., 1st Sess. 12-13 (1979) (slip op. 6 n.10). The cited statement of the Senate Labor and Human Resources Committee does not refer to the states or to the Eleventh Amendment in connection with awards of backpay. This subsequent legislative statement that fails to mention the Eleventh Amendment clearly is inadequate to abrogate states' immunity.

⁹Also unanswered in 1978 was whether Title VI eliminated states' Eleventh Amendment immunity. Even if it were clear that Congress, in enacting Title VI, intended to abrogate that immunity, that would not be enough to show that Congress intended to remove the Eleventh

It would be remarkable if Congress, which did not make absolutely clear in 1978 that any private right of action for damages existed at all to enforce the rights granted in Section 504 of the Rehabilitation Act, had made clear that it intended to abrogate the states' Eleventh Amendment immunity. As restated last Term in *Pennhurst*, congressional intention to abrogate the Eleventh Amendment must be "unequivocally expressed" (slip op. 8). Congress made no such unequivocal expression. It provided that the remedies available under Title VI would be available against "any recipient" of federal assistance, and states are "recipients." But it was not clear in 1978 what those remedies were. And Congress certainly never went so far as to state that they included federal court actions seeking retrospective relief from the states. The requisite unequivocal expression to abrogate states' Eleventh Amendment immunity is lacking.

The legislative history of the 1978 amendments, far from showing any clear intent to abrogate Eleventh Amendment immunity, supports the position that Congress did not intend to authorize retrospective damage actions against the states. Section 505(b) authorized attorney's fees to the prevailing party in actions brought under the Rehabilitation Act. Senator Cranston, the author of Section 505, stated on the Senate floor that, under *Hutto v. Finney*, the Eleventh Amendment was not a bar to the recovery of attorney's fees from states (124 Cong. Rec. 30347 (1978)). It is significant that the author of Section 505 showed that he

Amendment bar merely by cross-referencing Title VI in Section 505(a)(2) of the Rehabilitation Act. Such a cross-reference is not the requisite clear and unequivocal expression of congressional intent. Further indicia of focused congressional intent would be required. This is all the more true when the cross-reference is to a provision, such as Title VI, which had not been construed as abrogating Eleventh Amendment immunity.

understood that the Eleventh Amendment affected the provision, and expressed his opinion that it did not bar the award of attorney's fees under 505(b), but made no mention of the Eleventh Amendment in discussing Section 505(a)(2), the remedial provision implementing Section 504.¹⁰

This analysis of the attorney's fees provision of the 1978 amendments does not render the amendments meaningless in suits against state recipients or interpret them as providing a right without a remedy. Rather, it supports the position that Congress did not intend to abrogate the Eleventh Amendment immunity of states from retrospective damage suits when it enacted Section 505(a)(2). Under settled Eleventh Amendment doctrine, plaintiffs may seek prospective relief in federal courts in a suit for injunctive relief brought against state officials (*Ex parte Young*, 209 U.S. 123 (1908)). Under Section 505(b) and *Hutto v. Finney*, a plaintiff may, in an appropriate case, obtain attorney's fees from the states. Thus, a handicapped person such as this plaintiff, if his claim has merit, may be able to obtain injunctive relief in the form of an order requiring a state agency to hire him and an award of attorney's fees.¹¹

¹⁰The 1978 amendments also provided, in Section 505(a)(1), for remedies against the federal government. Noting that, under *United States v. Testan*, 424 U.S. 392 (1976), backpay will not be awarded against the federal government unless it is "specifically allowed by federal statute," the Senate Report cited *Testan* and explained that Congress intended that backpay be available against the federal government for violations of Section 501 (S. Rep. 95-890, 95th Cong., 2d Sess. 1978)). Congress should have been equally aware, in light of *Employees v. Department of Public Health, supra*, and *Edelman v. Jordan, supra*, that it must clearly express an intention to permit retrospective damage suits against states in federal court if it so intended. Yet it said nothing.

¹¹Plaintiff may not be able to obtain such relief in this suit because he failed to name state officials as defendants.

But, in the absence of clear congressional intent, he may not obtain retrospective relief in a federal court proceeding.

In short, the First Circuit properly evaluated the text and history of the Rehabilitation Act in *Ciampa v. Massachusetts Rehabilitation Comm'n*, *supra*. It noted that "Congress never got as far as explicitly providing a private cause of action under section 504" (718 F.2d at 3). Accordingly, it concluded that "Congress did not abrogate the states' Eleventh Amendment immunity" and that states receiving funds under the Rehabilitation Act do not thereby waive their immunity (718 F.2d at 3-4).¹²

¹²The Northern District of Illinois has reached the same conclusion (*Jones v. Illinois Department of Rehabilitation Services*, 504 F. Supp. 1244 (N.D. Ill. 1981), modified on other grounds, 689 F.2d 724 (7th Cir. 1982)). The court held that "section 504 * * * does not contain the requisite explicit Congressional authorization to enable individuals to bring suits against the states" (504 F. Supp. at 1257). It noted that, although Section 505(a)(2) provides that the remedies set forth in Title VI are available under Section 504, "title VI does not indicate that Congress intended to permit retrospective relief despite the Eleventh Amendment" (504 F. Supp. at 1257 n.54).

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

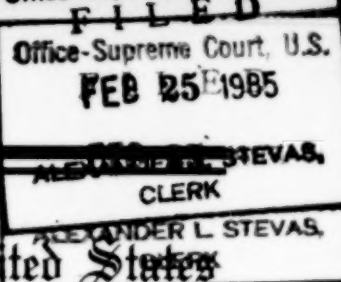
CHARLES FRIED
*Special Assistant to the
Attorney General*

CHARLES J. COOPER
*Deputy Assistant Attorney
General*

CHRISTOPHER J. WRIGHT
*Assistant to the Solicitor
General*

WALTER W. BARNETT
DAVID K. FLYNN
Attorneys

JANUARY 1985



In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-351

ATASCADERO STATE HOSPITAL
and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
Petitioners,
vs.
DOUGLAS JAMES SCANLON,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF AMICUS CURIAE THE DISABILITY AND EMPLOYMENT
ADVOCACY PROJECT OF THE EMPLOYMENT LAW CENTER
IN SUPPORT OF RESPONDENT DOUGLAS JAMES SCANLON**

JOAN M. GRAFF
Executive Director

ROBERT BARNES
Counsel of Record

WILLIAM HEBERT
Law Clerk

DIANE G. WORLEY
Law Clerk

*Employment Law Center
693 Mission Street, #701
San Francisco, California
(415) 495-6420*

51262

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. THIS COURT'S DECISIONS ON THE ELEVENTH AMENDMENT HAVE DEVELOPED TO RECONCILE THE COMPETING INTERESTS OF THE STATE AND FEDERAL GOVERNMENTS	7
II. CALIFORNIA'S SOVEREIGN IMMUNITY IS LIMITED BY THE FOURTEENTH AMENDMENT	21
III. THE ELEVENTH AMENDMENT DOES NOT BAR RESPONDENT'S PRAYER FOR INJUNCTIVE RELIEF, ATTORNEY'S FEES OR EQUITABLE RELIEF	32
CONCLUSION	42

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<u>Alexander v. Choate</u>	
<u>U.S.</u>	
53 L.W. 4072'	30, 41
<u>Chisolm v. Georgia (1793)</u>	
2 U.S. 419	7, 8, 9, 43
<u>Clark v. Barnard (1883)</u>	
108 U.S. 436	9
<u>Consolidated Rail Corp. v.</u>	
<u>Darrone (sub. nom: Le</u>	
<u>Strange v. Consolidated</u>	
<u>Rail Corp. (1984)</u>	
<u>U.S.</u>	
104 S. ct. 1248	30, 41
<u>Edelman v. Jordan (1974)</u>	
415 U.S. 651	passim
<u>EEOC v. Wyoming (1983)</u>	
460 U.S. 226	29
<u>Employees v. Missouri</u>	
<u>Public Health Dept. (1973)</u>	
411 U.S. 279	20, 25, 38, 39
<u>Ex parte Virginia (1880)</u>	
100 U.S. 339	9, 10, 11, 18, 22, 42
<u>Ex parte Young (1908)</u>	
209 U.S. 123	passim

	<u>Page(s)</u>
<u>Fairmont Creamery Co. v. Minnesota (1927)</u>	
275 U.S. 70	36, 37
<u>Fitzpatrick v. Bitzer (1976)</u>	
427 U.S. 445	passim
<u>Florida Department of State v. Treasure Salvors (1982)</u>	
458 U.S. 670	12
<u>Ford Motor Co. v. Dept. of Treasury (1945)</u>	
323 U.S. 459	15, 20, 38
<u>Guardian's Ass'n. v. Civ. Serv. Com'n of City of N.Y. (1983)</u>	
U.S. 104 S. Ct. 3221	30
<u>Hans v. Louisiana (1890)</u>	
134 U.S. 1	8, 9, 20, 42
<u>Hutto v. Finney (1978)</u>	
437 U.S. 678	passim
<u>In re Ayers (1887)</u>	
123 U.S. 443	20
<u>Milliken v. Bradley (1977)</u>	
433 U.S. 267	19, 35, 39, 40
<u>Mitchum v. Foster (1972)</u>	
407 U.S. 225	18
<u>Parden v. Terminal R. Co. (1964)</u>	
377 U.S. 184	19, 20, 38

	<u>Page(s)</u>
<u>Pennhurst State School</u>	
<u>Hospital v. Halderman</u> (1984)	
U.S.	
104 S. Ct. 900	23, 26, 34
<u>Perez v. Ledesman</u> (1971)	
401 U.S. 82	34
<u>Quern v. Jordon</u> (1979)	
440 U.S. 332	26, 35
<u>Scheuer v. Rhodes</u> (1974)	
416 U.S. 232	35
<u>South Carolina v. Katzenbach</u>	
(1966)	
383 U.S. 301	18
<u>Southeastern Community College v.</u>	
<u>Davis</u> (1979)	
442 U.S. 397	27

Federal Statutes

Rehabilitation Act of 1973,	
Pub. L. 93-112,	
87 Stat. 357 (29 U.S.C.	
section 701 et seq.) ..	passim
29 U.S.C. section 794	33, 36
42 U.S.C.	
section 1983	26
section 2000d	26, 27

Texts

Page(s)

Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpreta- tion, 83 Colum. L. Rev. 1889 (1983)	7, 19
---	-------

Constitutions

United States Constitution	
11th Amendment	passim
14th Amendment	passim
Article I, section 8, cl. 1	28, 31
Article III	7

Miscellaneous

45 C.F.R. section 84.2(f) ..	27
124 Cong. Rec. 30346-47 (Sept. 20, 1978)	29
Congressional Globe, 39th Congress, 1st Session (1866)	24
House Judiciary Committee Report on the Civil Rights Act of 1964 (88th Congress, 1st Session, Report No. 914)	30
The New York Herald, Oct. 25, 1866	24
The New York Times, Oct. 25, 1866	24



In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-351

ATASCADERO STATE HOSPITAL
and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
Petitioners,
vs.
DOUGLAS JAMES SCANLON,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF AMICUS CURIAE THE DISABILITY AND EMPLOYMENT
ADVOCACY PROJECT OF THE EMPLOYMENT LAW CENTER
IN SUPPORT OF RESPONDENT DOUGLAS JAMES SCANLON**

INTEREST OF AMICUS CURIAE

The Amicus Curiae, the Disability
and Employment Advocacy Project of the

Employment Law Center¹, is funded by a joint grant from the San Francisco and Wallace Alexander Gerbode Foundations to address issues regarding the employment rights of disabled individuals through education and legal advocacy. This project monitors California and federal court and administrative decisions of significance to disabled Californians; it publishes a quarterly newsletter designed to increase community awareness of the employment rights of disabled individuals; it trains California attorneys in the law of employment discrimination on the basis of handicap; and, it files amicus briefs in cases raising issues regarding the interpretation and enforcement of laws

¹Letters from counsel for the parties to this action, which consent to the filing of the Brief for the Amicus Curiae, have been filed with the Clerk of the Court pursuant to the U.S. Supreme Court Rule 42(2).

pertaining to employment discrimination based on physical handicap.

The issue presented in the case at bar, whether the Eleventh Amendment to the Constitution of the United States immunizes Atascadero State Hospital from suit by Douglas James Scanlon under Section 504 of the Rehabilitation Act of 1973, has great significance for the people served by the project.² Because the project serves both the disabled and the attorneys that represent them, the availability of remedies under Section 504 of the Rehabilitation Act of 1973 are of great moment to this amicus curiae. In California the state itself employs more people than any other employer.³ It is

²It is estimated that more than one and one-half million disabled Californians were employed or sought employment in 1978. "Executive Summary For The California Disability Survey", (prepared for the California Department of Rehabilitation), J. Merrill Shanks and Howard E. Freeman.

³California currently employs in excess of 180,000 employees.

also one of the major beneficiaries of federal funds under the Rehabilitation Act of 1973.⁴ Accordingly, it is not surprising that the vast majority of the federal cases that involve the amicus curiae are cases involving claims of employment discrimination against California, California agencies or California agents.

⁴Public records indicate that for fiscal year 1983, California received a total of \$26,684,822,392 from the U.S. Department of Health and Human Services alone. Office of the Assistant Secretary for Management and Budget, U.S. Dept. of Health and Human Services, "Financial Assistance by Geographic Area, Fiscal Year 1983, Region IX," DHHS Publications No. (65) 83-12.

SUMMARY OF THE ARGUMENT

This suit presents the question of whether the Eleventh Amendment bars employment discrimination actions against the states brought under the Rehabilitation Act of 1973. The Court of Appeals for the Ninth Circuit held that a private suit against the state is not barred. We agree. We take the position that the principles of federalism that underlie the Constitution suggest that this Court should weigh the competing interests of the state and federal governments in making its decision. We submit that the Court consider the following issues as they relate to abrogation of sovereign immunity: first, whether the Congressional Act in question was passed pursuant to the Fourteenth Amendment; second, whether the federal government has a legitimate

interest in asserting control over behavior traditionally regulated by Congress; third, whether the relief requested is prospective or retroactive. We feel that given these three considerations, the scale tips in the direction of the federal government in the case at bar. The federal judiciary is thus the proper forum to litigate suits against the state brought under the Rehabilitation Act of 1973.

ARGUMENT

I. THIS COURT'S DECISIONS ON THE ELEVENTH AMENDMENT HAVE DEVELOPED TO RECONCILE THE COMPETING INTERESTS OF THE STATE AND FEDERAL GOVERNMENTS

The Constitution as originally framed gave the federal judiciary under Article III the power to hear "Controversies . . . between a State and Citizens of another State." In Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), the Court interpreted Article III to mean that its jurisdiction extended to suits where the state is a defendant. The suit, brought by two residents of South Carolina, was an action to recover the price of military goods sold to Georgia in 1777. The Court ruled that it had original jurisdiction, and that Georgia was compelled to enter an appearance. As one commentator interprets the decision,¹ the effect of the

¹See Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation. 83 Colum. L. Rev. 1889 (1983).

decision, had it not been overruled by the Eleventh Amendment, would have been to force southern states to pay for the security of the new nation because these states were the probable defendants in suits by British citizens whose property had been confiscated after the war.

A few days after the decision in Chisolm Congress introduced what was to become the Eleventh Amendment.⁶ Although the wording of the Amendment does not preclude federal court jurisdiction over suits brought against a state by its own citizens, the Amendment was interpreted to prohibit such suits in Hans v. Louisiana, 134 U.S. 1 (1890). The Court's decision in Hans reflected a situation that somewhat resembled that faced in

⁶The amendment as originally introduced, read: "The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Chisolm. Hans arose out of Louisiana's repudiation of its bond obligations. Southern states, after the Civil War, overzealously issued bonds to finance internal improvements. Later pressure to repudiate the bonds led to numerous suits by citizens against their home states. The Supreme Court, after the passage of the Eleventh Amendment, refused to exercise its jurisdiction over suits which involved claims against the states' fiscs.

While this Court in Hans has recognized that a state is generally immune from suit, it has also recognized that the immunity of a state is not absolute and has circumscribed its application.⁷ These limitations were declared in Ex parte Virginia, 100 U.S. 339 (1880) and

⁷No one disputes, of course, that a state may be sued when it expressly consents to suit. See Hans v. Louisiana, *supra*, at 17; Clark v. Barnard, 108 U.S. 436 (1883).

Ex parte Young, 209 U.S. 123 (1908). In Ex parte Virginia, 100 U.S. 339 (1879), the Court stated that the Civil War amendments transferred power from the states to the federal government.

[I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the General Government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

Ex parte Virginia, supra, at 346.

Areas that were once solely regulated by the states became subject to federal scrutiny and subsequent enforcement by federal courts by reason of § 5 of the Fourteenth Amendment. The states submitted to federal control when they ratified that Amendment. This Court has reaffirmed the soundness of its holding in

Ex parte Virginia within the past ten years. See Fitzpatrick v. Bitzer, 427 U.S. 445, 454-455 (1976).

In Ex parte Young, citizens of Minnesota sued the state attorney general to enjoin him from enforcing a law that deprived them of due process. The doctrine of Ex parte Young holds that a suit against an official in his official capacity is not a suit against the state; that when the official acts unconstitutionally, he is "stripped of his official or representative character," Young, supra, 209 U.S. at 160, and cannot claim the shield that the Eleventh Amendment would otherwise provide. The Court has repeatedly affirmed Ex parte Young in spite of the obvious fact that suits against state officials often result in judgments that must be implemented by the particular state. The Court has simply considered the Fourteenth Amendment rights

paramount to the state's interest in immunity. See, e.g., Florida Department of State v. Treasure Salvors, 458 U.S. 670, 685 (1982).

Notwithstanding this Court's decisions in Ex parte Young and Fitzpatrick v. Bitzer, Petitioners argue in their brief that recent decisions of this Court hold that sovereign immunity is only qualified when Congress expresses its intent in "clear language" to set aside sovereign immunity. (Brief for Petitioners, p. 33.) Petitioners argue that this expression of intent is the first part of a two part test, the second part being whether the state has consented to suit, or has waived its immunity from suit.⁸ Petitioners claim that this is the strict rule of the Court, and that this rule must be followed in the case at bar. But Petitioners

⁸See, for example, Brief for Petitioners, p. 36.

cannot consistently support their position.

Petitioners argue that the rule is that there must be an abrogation of immunity by Congress and a consent to this abrogation by the states. (Brief for Petitioners, p. 31.) Petitioners claim that the "determining factor" in this rule is the clarity of congressional intent in the statutory scheme to bring the states under federal jurisdiction. (Brief for Petitioners, p. 34; Edelman v. Jordan, 415 U.S. 651 (1974).) As Petitioners immediately recognize, however, there is an "aberration" to this rule: Hutto v. Finney, 437 U.S. 678 (1978). (Brief for Petitioners, p. 33, n. 9.) Petitioners' explanation for this "aberration" is merely an admission that regardless of the clarity of congressional intent to abrogate, fee awards to the prevailing party are permissible against the state.

(Brief for Petitioners, pp. 76-77.) By this admission, Petitioners must abandon any pretense of their earlier claim that the statutory scheme must include clear language that the state's immunity has been abrogated, or that the state must somehow consent to the suit.

Petitioners also concede that legislation passed pursuant to the Fourteenth Amendment effectively removes the need to look to the second part of this strict test. (Brief for Petitioners, pp. 41-42; see also p. 42, n. 13.) This anomaly in Petitioners' argument arises because of this Court's decision in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), where it is stated, "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States

or state officials which are constitutionally impermissible in other contexts."

Fitzpatrick, supra, 427 U.S. at 456.

(Footnote omitted.)

The "other contexts" to which the Court refers are those in which the Civil War Amendments are not involved and particularly where a judgment, unsupported by statutory language, would provide for a liability against the state payable directly out of the state treasury.

(E.g., Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945).) This distinction serves to highlight another contradiction in Petitioners' position. Petitioners, on the one hand, claim that this Court applies a strict rule in sovereign immunity cases requiring "clear language" in the statutory scheme evidencing Congressional intent to abrogate state immunity, but by conceding that this rule does not apply in suits where the relief

requested is merely prospective, Petitioners bifurcate their rule: the showing of clear language applies only to suits for retroactive relief, but not to suits for prospective relief. (See, e.g., Brief for Petitioners, pp. 45-48.) The irreconcilability of the cases themselves with the strict rule enunciated by Petitioners in the opening of their brief manifests the problem with their position.

We submit that the contradictions found in Petitioners' brief are irreconcilable only because Petitioners stubbornly cling to a strict rule that fails adequately to explain the Eleventh Amendment decisions of this court. We believe that the decisions of this Court are consistent. We contend that the cases decided under the Eleventh Amendment are not based upon the two-part rule of clear statutory language expressing congressional-

al intent to abrogate immunity and concomitant waiver or consent by the state, but upon a more flexible principle: a balancing of competing state and federal interests which underlie our constitutional form of government. We agree with the Court that decisions concerning sovereign immunity must be decided using "[t]he principles of federalism that inform Eleventh Amendment doctrine. . . ." Hutto v. Finney, supra, 437 U.S. at 691.

If we look at the Court's Eleventh Amendment decisions through federalist glasses, we shall see through the "clear language" rule and the illusory contradictions it engenders. We have ascertained the following general considerations that the Court uses to balance federal and state interests. The first consideration is the section of the Constitution under which the statute in question was passed. Laws passed pursuant to the Fourteenth

Amendment inherently express a greater showing of abrogation of state immunity from suit. (Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).) The states relinquished power to the federal government when they ratified it. (Ex parte Virginia, 100 U.S. 339 (1879).)

Ex parte Virginia's early recognition of this shift in the federal-state balance has been carried forward by more recent decisions of this Court. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); Mitchum v. Foster, 407 U.S. 225, 238-239 (1972). There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the states.

Fitzpatrick v. Bitzer,
supra, at 455.

The second consideration is whether the federal government has a legitimate interest in asserting control over behavior traditionally regulated by Congress. The federal government tries to ensure that every citizen will receive

equal treatment under the laws and that there exists a uniformity in the application of federal law from state to state. Parden v. Terminal Railway Co., 377 U.S. 184 (1964); Milliken v. Bradley, 433 U.S. 267 (1977).

In light of this weighing principle, we find that Petitioners' argument for a "clear language" rule has only one limited application, which is the Court's third consideration: whether a judgment can be entered for retroactive relief. The reasoning behind the clear language rule is that the area of most interest to the state is its fisc. As the history of the Eleventh Amendment testifies, most cases barred are for monetary relief.⁹ As the

⁹See, for example, Gibbons, supra. Gibbons argues that the Court in Hans declared the existence of immunity from citizen suits because the southern states refused to honor bonds issued after the Civil War, and that the federal judiciary (due to an act of Congress that limited the use of army regulars by federal marshals) had no means to enforce its decrees against the states. See also, In

Court noted in Parden, the purpose of the Eleventh Amendment is to keep the long arm of the federal judiciary out of the treasuries of the states:

This case is distinctly unlike Hans v. Louisiana, supra, where the action was a contractual one based upon state bond coupons, and the plaintiff sought to invoke federal question jurisdiction by alleging an impairment of the obligation of the contract. Such a suit on state debt obligations without the State's consent was precisely the "evil" against which both the Eleventh Amendment and the expanded immunity doctrine of the Hans case were directed.

Parden v. Terminal R. Co.,
supra, 377 U.S. at 187-188.

The clear language rule evolved as a means to protect states from unwarranted intrusions into their treasuries by the federal judiciary. But as we shall demonstrate, laws passed pursuant to the

re Ayers, 123 U.S. 443 (1887), holding that Virginia could repudiate her coupons without federal interference; Edelman v. Jordan, 415 U.S. 651 (1974); Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945). But cf. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Fourteenth Amendment allow greater discretion by federal courts to grant equitable relief to aggrieved parties.

By weighing the considerations outlined above, this Court will find a logical way to reconcile its earlier decisions, all of which are based upon the inherent tensions of our federalist system of government. We contend that the Court must find that the federal interest in maintaining jurisdiction over citizen suits brought under the Rehabilitation Act of 1973 as amended will outweigh the state's interest in asserting its immunity.

II. CALIFORNIA'S SOVEREIGN
IMMUNITY IS LIMITED BY
THE FOURTEENTH AMENDMENT.

Under Section 5 of the Fourteenth Amendment, Congress has the power to

remedy state discrimination found to deny equal protection. This power to determine whether the Fourteenth Amendment has been violated and to determine what the appropriate remedies are is extensive. The Court has made it clear that the need to legislate under Section 5 will warrant federal intrusion upon the states in certain circumstances. See, e.g., Fitpatrick v. Bitzer, supra, at 454.

In Ex parte Virginia, supra, the Supreme Court stated:

The prohibitions of the fourteenth amendment are directed to the states, and they are to a degree restrictions of state power. It is those which congress is empowered to enforce, and to enforce against state action.
. . . [S]uch enforcement is not an invasion of sovereign immunity.
. . . [T]he constitutional amendment is ordained for a purpose.

Id at 346-47.

In 1976, the Supreme Court reaffirmed Ex parte Virginia stating that "the Fourteenth Amendment was intended to be . . . a limitation of the power of the

state and an enlargement of the power of Congress." Fitzpatrick, at p. 454.

Even more recently in Pennhurst State School and Hospital v. Halderman, ___ U.S. ___, 104 S. Ct. 900 (1984) (hereinafter Pennhurst II), the Court emphasized the subordination of the sovereign immunity doctrine to federal interests. Pennhurst II discusses Ex parte Young, 209 U.S. 123 (1908) as a case marking the emergence of the idea that conduct which threaten to violate federal constitutional rights -- in Young itself, the right to substantive due process -- was inherently actionable as a matter of federal law.

Clearly, the Amendment was intended to alter the federalist balance of power between the states and the General Government and to centralize power over matters arising under the Fourteenth Amendment in the federal government. By ratifying the Amendment, the states surrendered power to

the federal government. Public debate focused on the fact that the branches of the federal government would be given increased power over individual rights to the detriment of state autonomy. See, e.g., The New York Herald, Oct. 25, 1866 at 6, col.4; New York Times, Oct. 25, 1866 at 4, col.3.

Also, it appears that Congress was to be given extremely broad powers to enforce the amendment. Part of the evidence of this power comes from the failure of most members of Congress to discuss Section 5 during the debates while going over in detail the other sections. See, e.g., Congressional Globe, 39th Congress, 1st Session (1866) at 2469 (Rep. Kelly) 2502, 2512 (Rep. Raymond). The failure to discuss the section seems to stem from a widely held belief that it was an open ended grant of power to enforce the other sections.

Petitioners cites Employees v. Missouri Public Health and Welfare for the proposition that the statute must expressly abrogate the states immunity from retroactive liability.¹⁰ However, in Hutto v. Finney, 437 U.S. 678, 698, n. 31, the court clearly distinguished the claims in both Employees and Edelman as being based on statutes rooted in Congress' Article I powers. In Hutto as in Fitzpatrick, the claim is based on a statute enacted to enforce the Fourteenth Amendment. As pointed out in Fitzpatrick:

The Eleventh Amendment and the principle of sovereign immunity which it embodies . . . are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. . . . When Congress acts pursuant to Section 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms

¹⁰See this brief, Section III, infra.

embody limitations on state authority.

Id. at 456.

Petitioner relies on Quern v. Jordan, 440 U.S. 332 (1979) as quoted in Pennhurst II at p. 907 to support the proposition that regardless of the source of Congress' power, its legislation must show evidence of express abrogation. In Quern this Court held that states are immune from suit brought under 42 U.S.C. Section 1983. Unlike Section 1983, Congress made no attempt to shield states from liability when drafting the Rehabilitation Act of 1973.

The regulations under which the Rehabilitation Act was implemented provide clear evidence that Congress intended states to be the prime recipients of federal financial assistance and subject them to a private right of action under Title VI of the Civil Rights Act of 1964,

42 U.S.C. sections 2000d et seq. First states are included within the definition of recipients under 45 C.F.R. section 84.2(f). Second, section 505 of the Act, 29 U.S.C. section 794, makes available to any person the remedies, procedures, and rights set forth in Title VI, in any action brought to enforce the Act.

Finally, the implementing regulations note that it is likely that recipients of federal financial assistance will be sued, if at all, through a private action. 45 C.F.R. section 84, App. 1 section 8.¹¹

Aware that California's sovereign immunity from suit under the Rehabilitation Act depends largely upon whether or not that Act is deemed to be an action of

¹¹In addition, California's amicus curiae brief in Southeastern Community College v. Davis, 442 U.S. 397 (1979), states: "It is clear that a private right of action under Section 504 has always been contemplated by Congress." Brief of California as Amicus Curiae in Southeastern Community College v. Davis at 18.

Congress pursuant to the Fourteenth Amendment, Petitioners argue it is not. It is clear, however, that the Rehabilitation Act is an exercise by Congress under Section 5 of the Fourteenth Amendment, as well as the Spending Clause.

Though an act may be passed pursuant to the spending power of Congress, this fact does not preclude it from also being passed pursuant to the Fourteenth Amendment. Petitioner argues that no language supports the contention that the Rehabilitation Act was passed pursuant to the enforcement clause of the Fourteenth Amendment. While it is true that the court must determine what is the intent of Congress, Congress need not recite the words "Section 5" or "Fourteenth Amendment" or "equal protection," in order for the court to determine that the statute was passed pursuant to the Fourteenth

Amendment. EEOC v. Wyoming, 103 S. Ct.
1054 (1983).

When Congress amended the Rehabilitation Act in 1978 to add attorneys' fees to the remedies available to prevailing parties, it squarely focused on the Eleventh Amendment immunity of the states. Senator Alan Cranston was one of the chief sponsors of the amendments. He stated:

. . . [With respect to State and local bodies or State and local officials, attorney's fees, similar to other items of cost, would be collected from the official, in his official capacity; from funds of his or her agency or under his or her control; or from the State or local government -- regardless of whether such agency or Government is a named party. The authorization of attorney's fees under proposed section 505(b) in cases brought to Congress under among other things, section 5 of the 14th amendment. Thus, in accordance with the Supreme Court's decision in Hutto v. Finney, No. 77-1660, June 23, 1978, the 11th amendment is no bar to the recovery of attorney's fees under proposed section 505(b) from State government as a result of an action or proceeding to enforce or charge a violation under Title V of the Rehabilitation Act of 1973.

124 Cong. Rec. 30346-47
(remarks of Sen. Cranston,
Sept. 20, 1978).

Petitioners also contend that the language of Section 504 of the Rehabilitation Act is virtually identical to Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. section 2000d, which has been characterized as typical spending legislation. Consolidated Rail Corp. v. Darrone, 104 S. Ct. at p. 1250 (1984); Guardian's Ass'n v. Civ. Serv. Com'n. of City of New York, 104 S. Ct. 3221 (1983).¹ In light of the legislative history behind the Civil Rights Act of 1964, this comparison is misleading if not incorrect.

The House Judiciary Committee Report on the Civil Rights Act of 1964 (88th Congress, 1st Session, Report No. 914)

¹See also Alexander v. Choate, ___ U.S. ___, 53 L.W. 4072, where a unanimous Court stated, "[T]oo facile an assimilation of Title VII law to section 504 must be resisted." Id. at 4073, n. 7.

established that the Act is a constitutional and desirable means of dealing with the injustices and humiliations of racial and other discrimination.

In the last decade it has been increasingly clear, that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced on the one hand by a growing impatience by the victims of discrimination with its continuance and on the other hand, by a growing recognition on the part of all our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated. A number of provisions of the Constitution of the United States clearly supply the means to secure those rights.

That the Fourteenth Amendment is one of these provisions is supported in the remarks on the floor by the Hon. Robert Kastenmeir: "using both the Fourteenth Amendment and the commerce clause as the authority for requiring that the federal government shall take action to prevent the use of federal funds in support of segregated facilities." [Congress must be

given great latitude to effectuate the broad remedial purpose behind the Act.] Read in its entirety, the Civil Rights Act of 1964 was clearly implemented under Section 5 of the Fourteenth Amendment with Title VI being the means Congress chose to enforce its provisions.

Similarly, the Rehabilitation Act's overall purpose is clearly to provide handicapped persons the equal protection of the laws, with Section 504 being a means by which Congress chose to implement its provisions.

III. THE ELEVENTH AMENDMENT
DOES NOT BAR RESPONDENT'S
PRAYER FOR INJUNCTIVE
RELIEF, ATTORNEY'S FEES
OR EQUITABLE RELIEF

In his complaint, Scanlon prays for the following relief: that the court

1. Issue a preliminary and permanent injunction requiring defendants to employ plaintiff in a comparable position to the one for which he was rejected which will satisfy his field experience requirement for his recreation administration degree;

2. Declare that defendant's actions in refusing to hire plaintiff as a graduate student assistant violated 29 USC § 794 . . . ;
3. Award plaintiff monetary damages for lost salary with interest, all fringe benefits and all civil service rights from the time that he would have been employed. . . ;
4. Award plaintiff any further compensatory damages;
5. Award plaintiff his costs in bringing this action;
6. Award plaintiff reasonable attorney's fees;
7. Award plaintiff such other relief as the Court deems proper.

(Joint Appendix, pp. 21-22.)

The relief that Scanlon requests can be divided into three areas: injunctive relief, attorney's fees (including costs), and equitable relief. We shall examine each of these requests in turn.

The Eleventh Amendment is no bar to suits for prospective (injunctive) relief as suits brought to enjoin intentional discrimination under the Constitution

carry an overpowering need "to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" Pennhurst II, supra, at 910 (quoting Ex parte Young, 209 U.S. 123, 160 (1908)). Regardless of whether there exists a statutory scheme explicitly naming states as possible defendants, the Eleventh Amendment does not bar suits to enjoin state officials from unconstitutional conduct. Ex parte Young, supra. Nowhere does the balancing principle between state and federal interests more clearly manifest itself than in suits following the doctrine of Ex parte Young. As Justice Brennan has observed,

Ex parte Young was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.

Perez v. Ledesma. 401 U.S.
82, 106 (1971).

And as the Court pointed out in Quern v. Jordan, 440 U.S. 332, at 337 (1979), "[A] federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. Edelman v. Jordan 415 U.S. 651, 667-668; see Milliken v. Bradley, 433 U.S. 267, 289 (1977); Scheuer v. Rhodes, 416 U.S. 232, 237 (1974)." To enjoin Atascadero State Hospital and the California Department of Mental Health from discriminating against Scanlon clearly falls within the ambit of prospective relief..

Nor is the second type of relief - attorney's fees and costs - barred by the Eleventh Amendment. As Senator Cranston pointed out in his comments on § 794 of the Rehabilitation Act,¹³ this Court's

¹³See this brief, section II, supra.

decision in Hutto v. Finney, 437 U.S. 678 (1978) stands for the proposition that Congress may, in determining what is appropriate legislation, award attorney's fees to the prevailing party. Hutto v. Finney, supra, 693-694. Indeed, the opinion in Hutto relied upon the Court's decision in Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927), where the State challenged an award of such costs, but the Court "squarely rejected the State's claim of immunity. Far from requiring an explicit abrogation of state immunity, we relied on a statutory mandate that was entirely silent on the question of state liability." Hutto v. Finney, supra, at 696. (Emphasis added.) Section 794 of the Rehabilitation Act, on the other hand, explicitly provides for attorney's fees in actions brought to enforce the Act. When the federal judiciary awards costs against the state, it treats

the state "just as any other litigant" (Fairmont Creamery Co. v. Minnesota, supra, at 77); the federal court's award of fees serves to promote the federal interest in vindicating the supremacy of the laws of the United States by encouraging aggrieved parties to bring suits to enforce federal law.

Finally, we submit that equitable relief, Scanlon's third request, is not barred by the Eleventh Amendment in this instance. As the Court wrote in Edelman v. Jordan, supra, 415 U.S. at 667, "As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that between night and day." Because it is not an award for a legal obligation incurred before the litigation,¹⁴ compensation for the money

¹⁴Awards for legal obligations incurred

Scanlon would have been earning as an employee for the state while he conducts this lawsuit is ancillary, in accordance with the decisions of this Court. Such compensation would resemble the award of costs allowed in Hutto v. Finney, supra. The relief that Scanlon requests is compensation for lost wages incurred by him while California resists his suit. The relief prayed for is easily distinguished from that prayed for in

Employees.¹⁵ There the Court stated,

It is one thing, as in Parden, to make a state employee whole; it is quite another to let him recover double against a State. Recalcitrant private employers may be whipped into line in that manner. But we are

prior to initiation of suit were the type of "evil" that the Eleventh Amendment was designed to prohibit. Parden, supra, at 187-188; see this brief, Section I, supra.

¹⁵ Similarly, the award requested in Edelman is distinguishable from that requested by Scanlon. In Edelman (as in Ford Motor Co.), the complainant requested that the state pay money that was withheld prior to the commencement of the litigation. Scanlon asks to recover money he loses by pursuing this litigation. It is money lost concurrent with the litigation and thus prospective.

reluctant to believe that Congress, in pursuit of a harmonious federalism, desired to treat the states so harshly.

Employees, supra, at 286.¹⁶

Nor is the amount of lost pay that he has accrued an issue, for it could have no more than an ancillary effect on California's treasury.¹⁷

Furthermore, the considerations for relief in cases of discrimination differ from those in other contexts. Milliken v. Bradley, supra, 433 U.S. 267 (1977), established the following three principles to guide district courts in their directions to state officials to alleviate discrimination:

¹⁶Scanlon does not ask to recover double, but merely to be made whole as if the discrimination had never taken place.

¹⁷Cf. Milliken v. Bradley, 433 U.S. at 293 (Powell, J. concurring), where the Court allowed an injunction ordering a State to pay almost \$6 million to desegregate the Detroit school system. That ancillary costs to end discrimination impose some liability on State governments is surely no bar to the district court granting backpay to Respondent Scanlon.

In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. [Citation.] The remedy must therefore be related to 'the condition alleged to offend the Constitution. . . . ' Milliken [v. Bradley], 418 U.S. [717,] 738 (1974). Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' Id., at 746. Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. (Footnotes omitted.)

Milliken v. Bradley, *supra*, 280-281, as quoted in Hutto v. Finney, *supra*, 437 U.S. 678, 711 (Rehnquist, J., dissenting).

We believe that, consistent with this Court's guidelines that were established to remedy the wrongs caused by employment discrimination, Scanlon should be awarded relief designed to restore him to the position he would have occupied had the discrimination not occurred. The federal interest in making the victims of discrimination whole clearly outweighs the

state's interest in asserting its Eleventh Amendment rights in such a way that would allow it to discriminate with impunity against the disabled.

As this Court has noted, the major purpose of the Rehabilitation Act is to provide employment. See Consolidated Rail Corp. v. Darrone, 465 U.S. ___, n. 13.¹⁸ That Scanlon, as a result of employment discrimination by the state of California, has been denied an opportunity to complete his requirements for his graduate degree, thereby delaying his ability to pursue his chosen career, unquestionably justifies an award of attorney's fees, costs and equitable relief as the court deems proper.

¹⁸"The primary goal of the Act is to provide employment." Consolidated Rail Corp., supra, n. 13; cited in Alexander v. Choate, supra, n. 28.

CONCLUSION

This Court's decisions in Hans and Edelman and its decisions in Ex parte Young, Ex parte Virginia, Hutto and Fitzpatrick appear to be in conflict. On the one hand, the Eleventh Amendment bars all suits against a state by its citizens but on the other hand, exceptions have been created when the Fourteenth Amendment is involved or where plaintiffs are ingenious enough to file their suits against state officials rather than the state itself. It is the contention of this amicus curiae that the apparent conflict in these cases is explained by reference to underlying principles of federalism. That is to say, the Eleventh Amendment recognizes that each state is sovereign with plenary powers; the federal government exists by consent of the federated states and the people and has only the powers granted it by the Constitution.

Seen in this light, the Eleventh Amendment states a principle -- the sovereign immunity of the individual states -- which except for the fact of Chisholm, might never have needed expression. It is a principle axiomatic to our constitutional form of government.

But where Hans and Edelman reaffirm the sovereign immunity of the states, the Court is well aware that applying sound principles of federalism to different circumstances may operate to eliminate that immunity. Such is the case at bar. Scanlon is not barred from suing California because he sues under a Congressional Act passed pursuant to the Fourteenth Amendment; he seeks prospective and injunctive relief; and the federal

interest in ending employment discrimination against the handicapped outweighs California's claim of sovereign immunity.

Respectfully submitted,

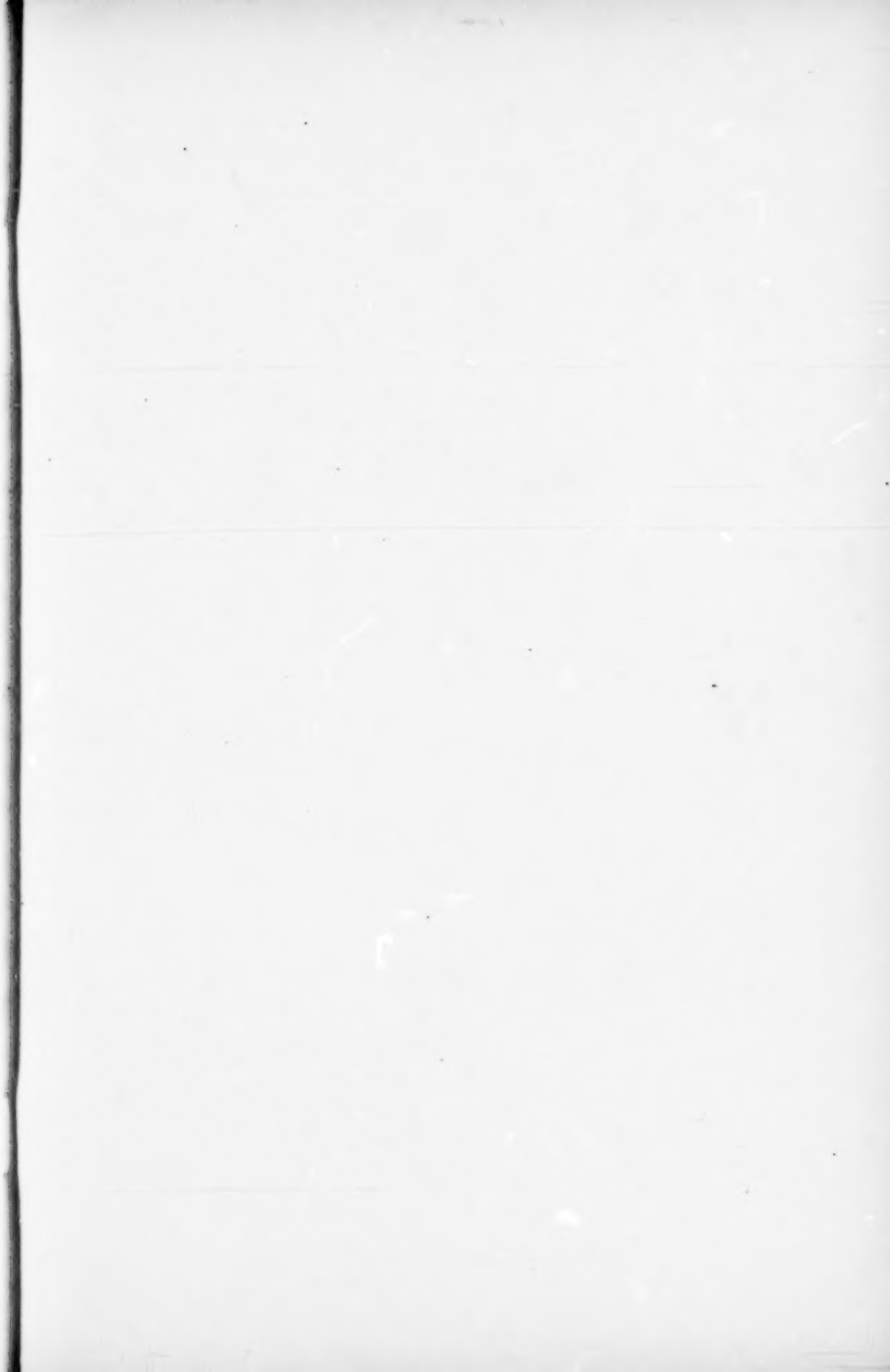
Joan M. Graff
Executive Director

Robert Barnes
Counsel of Record

William Hebert
Law Clerk

Diane G. Worley
Law Clerk

Attorneys for Amicus
Curiae



6
No. 84-351

FEB 25 1985

FRANKLIN L. STEVENS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

ATASCADERO STATE HOSPITAL, *et al.*,

Petitioners,

v.

DOUGLAS JAMES SCANLON

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT
ON BEHALF OF SENATOR ALAN CRANSTON, SENATOR
CLAIBORNE PELL, SENATOR ROBERT STAFFORD,
SENATOR LOWELL WEICKER, REPRESENTATIVE
MARIO BIAGGI, REPRESENTATIVE DON EDWARDS,
REPRESENTATIVE WILLIAM FORD, REPRESENTATIVE
JAMES JEFFORDS, and REPRESENTATIVE
GEORGE MILLER**

BONNIE MILSTEIN

Center for Law and
Social Policy

1751 N Street, N.W.

Washington, D.C. 20036

(202) 872-0670

Counsel for Amici

BEST AVAILABLE COPY

5782

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR
HARD COPY AT THE TIME OF FILMING.
IF AND WHEN A BETTER COPY CAN BE
OBTAINED, A NEW FICHE WILL BE
ISSUED.

QUESTIONS PRESENTED

1. Should Quern v. Jordan, 440 U.S. . 332 (1979), be applied retroactively to statutes adopted prior to March 5, 1979?

2. Is Quern v. Jordan, insofar as it holds that no statute can abrogate a state's sovereign immunity unless the statutory history or language "focuses directly on the question of state liability", inconsistent with Article I of the Constitution?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Statement of Interest	1
Summary of Argument	6
Argument	
I. <u>Quern v. Jordan</u> , 440 U.S. 332 (1979), Should Not Be Applied Retroactively to Statutes Adopted Prior to March 5, 1979	9
II. Article I Does Not Authorize This Court Direct Congress, As A Precondition of Legisla- tion Subjecting A State to Suit in Federal Court, to "Focus Directly on the Question of State Liability"	31
Conclusion	50

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Alexander v. Choate, ____ U.S. ____ (1985)	20
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)	23
Camacho v. Public Service Comm'n, 450 F. Supp. 231 (D. Puerto Rico 1978)	27
Camenisch v. University of Texas, 451 U.S. 390 (1981)	21
Consolidated Rail Corp. v. Darrone, 79 L.Ed.2d 568 (1984)	20
Edelman v. Jordan, 415 U.S. 651 (1974)	14, 19, 20, 26, 27
Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973)	13, 19, 20, 25-29, 32, 41
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	14, 26
Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)	22
Garcia v. San Antonio Metropolitan Transit Authority, No. 82-1913	9, 46

Green v. State of Utah, 539 F.2d 1266 (10th Cir. 1976)	27
Hans v. Louisiana, 134 U.S. 1 (1890)	34
Hutto v. Finney, 437 U.S. 678 (1978)	6, 8, 10, 15, 26, 27, 32, 33, 41, 44
Jennings v. Illinois Office of Education, 589 F.2d 935 (7th Cir. 1979)	27
Imbler v. Pachtman, 424 U.S. 409 (1976)	25
Immigration and Naturalization Service v. Chadha, 77 L.Ed.2d 317 (1983)	48
Mills Music, Inc. v. State of Arizona, 591 F.2d 1278 (9th Cir. 1979)	27
Parden v. Terminal Railway, 377 U.S. 184 (1964)	6, 7, 10-14, 17-19, 29, 31, 33, 41, 46
Pennhurst State School & Hospital v. Halderman, 79 L.Ed.2d 67 (1984)	32
Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959)	10, 14, 19
Procunier v. Navarette, 434 U.S. 555 (1978)	7, 18, 26

Quern v. Jordan, 440 U.S. 332 (1979)	<u>passim</u>
Scheuer v. Rhodes, 416 U.S. 232 (1974)	18
Southeastern Community College v. Davis, 442 U.S. 397 (1979)	20, 21
Tenney v. Brandhove, 341 U.S. 367 (1951)	25
Witter v. Pennsylvania National Guard, 462 F. Supp. 279 (E.D. Pa. 1978)	27

Statutes

Civil Rights Act of 1964, Title II	39
Civil Rights Act of 1964, Title VII	39
Fair Labor Standards Act	13, 39
Vocational Rehabilitation Act of 1973, § 504	<u>passim</u>
16 U.S.C. § 1540(g)(1)	39
42 U.S.C. § 1983	24, 33, 34
42 U.S.C. § 2000a-3(a)	39
49 U.S.C. § 1686	39
49 U.S.C. § 2014	39

Other Authorities

118 Cong. Rec. (1972)	26
119 Cong. Rec. (1973)	29
S. Rep. 93-318	28
Field, "The Eleventh Amendment and Other Sovereign Immunity Doctrines: Con- gressional Imposition of Suit Upon States", 126 <u>U.Pa.L.Rev.</u> 1203 (1978)	27
Liberman, "State Sovereign Immunity in Suits to Enforce Federal Rights", 1977 <u>Wash. U.L.Q.</u> 195	27

No. 84-351

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

ATASCADERO STATE HOSPITAL, et al.,

Petitioners

v.

DOUGLAS JAMES SCANLON

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE IN SUPPORT OF
RESPONDENT ON BEHALF OF SENATOR
ALAN CRANSTON, SENATOR CLAIBORNE
PELL, SENATOR ROBERT STAFFORD,
SENATOR LOWELL WEICKER, REPRESENTA-
TIVE MARIO BIAGGI, REPRESENTATIVE
DON EDWARDS, REPRESENTATIVE WILLIAM
FORD, REPRESENTATIVE JAMES JEFFORDS,
and REPRESENTATIVE GEORGE MILLER

STATEMENT OF INTEREST*

This amicus brief is submitted on behalf of nine members of Congress. Most of the amici were members of Congress when section 504 was originally enacted. Senators Cranston and Stafford are the only present members of the Senate who served in 1972 on the Subcommittee on the Handicapped of the Labor and Public Welfare Committee, which actually drafted section 504 in that year.

Amici believe that the construction of section 504 urged by petitioner in this case would as a practical matter largely

* Letters from the parties as consenting to the filing of this brief are being filed with the Clerk.

nullify that statute insofar as it applies to the states. Petitioner argues that section 504 should be read to allow the federal courts to grant only prospective relief for violations of that law. Such a construction would effectively postpone the effective date of the law, which Congress provided would be September 26, 1973, until whatever time in the future a federal judge issues an injunction directing a particular state institution to obey the law. Absent such an injunction, and immune from any threat of financial consequences for disobedience, the states would be free to discriminate on the basis of handicap in any or all of their federally assisted programs. We would hope that, were section 504 a eviscerated in this manner, California and the other states receiving federal

assistance would choose to refrain from such discrimination. But in enacting section 504 it was the intent of Congress to create a law to compel all federal aid recipients to desist at once from any form of discrimination against the disabled, not to merely make a casual suggestion which the states, absent a federal injunction, were at liberty to accept or disregard at will.

Petitioner's suggestion that Quern v. Jordan, 440 U.S. 332 (1979), be applied retroactively to statutes enacted prior to 1979 would present Congress with a problem unique in both its magnitude and complexity. Quern, as petitioner interprets it, requires that Congress legislate in a special way when it wishes to subject the states to suit for violating a federal law. Whatever the merits of this stan-

dard, it was not the reigning constitutional theory in 1972-73 when section 504 was enacted, nor was it the clearly established rule of construction when most existing federal laws were adopted. If Quern is applied retroactively, Congress will be compelled to review large portions of the United States Code, much of it enacted even earlier than section 504, to restore the meaning of statutes that would otherwise be altered by the application of such a rule.

Amici believe that the decision in Quern, unless limited by this Court, would raise serious constitutional problems under Article I. The doctrine that petitioner proposes to read into Quern does not purport to be a method of divining the intent of the Congress, but seeks to require Congress to legislate in

a special manner whatever it subjects the states to suit in federal court. This doctrine is claimed to stem not from any demonstrated congressional concern about such immunity, but from a frequently expressed "reluctance" on the part of the Court to apply such laws in a literal manner. The dissent in Hutto v. Finney, 437 U.S. 678 (1978), candidly acknowledged that a similar rule it proposed was intended to "structur[e] the legislative process . . . to protect the states' interests." 437 U.S. at 706 n. 4. Amici submit that it is Congress, not the federal judiciary, that should undertake to structure the legislative process and to decide what interests that structure ought to protect.

SUMMARY OF ARGUMENT

Under the rule of construction applied in Parden v. Terminal Railway, 377 U.S. 184 (1964), section 504 would have been interpreted to subject to suit in federal courts state recipients of federal financial assistance. Petitioner urges that Parden is no longer new law, and that a different rule of construction was established by later decisions, most notably Quern v. Jordan, 440 U.S. 332 (1979). But Parden, regardless of whether it has now been disapproved, was the reigning constitutional theory of the day when section 504 was drafted. The standard of construction established by Quern should not be applied retroactively to statutes adopted years earlier. Members of Congress, like other public officials, "cannot be expected to predict

the future course of constitutional law."
Procunier v. Navarette, 434 U.S. 555, 562
(1978).

Petitioner suggests that the intent of Congress in 1972-73 is irrelevant, since Congress in drafting section 504 failed to utilize the "foundational language" which they believe is required by Quern. Petitioner construes Quern as directing Congress to utilize certain special statutory language, and to expressly consider the consequences of subjecting states to suit in federal court, if Congress wishes to authorize such suits. This approach is supported to some degree by a dissent in Hutto v. Finney, 437 U.S. 678 (1978), which suggested that by adopting such a rule the Court could "structur[e] the legislative process" and thus "protect the states'

interests." 437 U.S. at 706 n. 4. Amici urge that under Article I it is Congress, not the judiciary, which is entrusted with the responsibility of structuring the legislative process. The interests of the states are adequately protected by the political process, and require no such judicial intervention in the internal workings of Congress. Garcia v. San Antonio Metropolitan Transit Authority, No. 82-1913. Statutes authorizing suits against any recipient of federal funds should be literally construed to authorize suits against state recipients.

ARGUMENT

I. QUERN V. JORDAN, 440 U.S. 332 (1979), SHOULD NOT BE APPLIED RETROACTIVELY TO STATUTES ADOPTED PRIOR TO MARCH 5, 1979.

This case requires the Court to

decide whether a major change in the rules of statutory construction should be applied to legislation enacted before that change occurred. The court of appeals below, in holding that section 504 abrogated the sovereign immunity of the states, relied heavily on Parden v. Terminal Railway, 377 U.S. 184 (1964) and Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959). (Pet. App. A-4). Petitioner and the United States urge, not without reason, that Parden and Petty are no longer good law. Petitioner asserts that "their holdings, for the most part, have been eviscerated" by later decisions. (P. Br. 35 n. 11). Petitioner also suggests, in light of Quern, that Hutto v. Finney, 437 U.S. 678 (1978) was wrongly decided. (P. Br. 46-47 n. 16). The United States similarly

argues that "[i]t is certainly difficult to conclude" that the circumstances of Parden present "the type of clear and unequivocal abrogation of Eleventh Amendment immunity required by" subsequent decisions. (U.S. Br. 12 n. 6).

It does indeed appear that over the last twenty years there has been a substantial alteration in the standard applied by this Court in ascertaining whether a statute abrogates a state's Eleventh Amendment immunity. The standard of construction now advanced by petitioner, and arguably supported by recent caselaw, however, was expressly rejected by this Court in Parden v. Terminal Railway, 377 U.S. 184 (1964). In Parden four members of the Court proposed that a statute be construed to abrogate a state's immunity "[o]nly when Congress has clearly

considered the problem and expressly declared that any State which undertakes given regulable conduct" will be subject to suit. 377 U.S. at 198-99. (Dissenting opinion). The majority in Parden, however, rejected this proposed requirement, and held that states were subject to suit under the Federal Employer's Liability Act even though there was no legislative history suggesting that Congress had specifically considered that issue, and no special reference to states in the statutory provision authorizing private damage actions. 377 U.S. at 188-90. The Court held that a general statutory cause of action was to be construed as applicable to state defendants "in the absence of express provision to the contrary." 377 U.S. at 190.

For fifteen years thereafter, despite repeated opportunities to do so, the Court declined to embrace the requirement of express consideration and language proposed by the dissent in Parden. In Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973), the Court held that the Fair Labor Standards Act had not abrogated the sovereign immunity of the states. But the majority in Employees neither adopted nor referred to the rigid standard rejected in Parden, and based its conclusion instead on a number of factors peculiar to the language and legislative history of the FLSA.¹ Significantly,

¹ The majority emphasized, for example, that section 16(b), which authorized private suits, had been enacted when state agencies were not subject to the FLSA, and had not been changed after the states were made subject to that law. 411 U.S. at 285.

Justice Stewart, who had joined the dissent in Parden, concluded that the FLSA had "lifted the State's immunity from private suit", 411 U.S. at 289 (Marshall and Stewart, J., dissenting), even though the FLSA clearly did not meet the standard proposed by the Parden dissent. In Edelman v. Jordan, 415 U.S. 651 (1974), the issue of abrogation was the subject of only cursory discussion. A claim that the Social Security Act rendered states subject to suit was summarily rejected with a notation that that Act "by its terms did not authorize suit against anyone." 415 U.S. at 651. The majority emphasized that that result was mandated by "this Court's holding in Parden and Petty . . . " 415 U.S. at 672.

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court held that Title VII of the 1964 Civil Rights Act, as amended in 1972, did authorize private plaintiffs "to sue the State as employer", 427 U.S. at 452, but the Court gave no indication of what standard it had applied in arriving at that conclusion. In Hutto v. Finney, 437 U.S. 678 (1978) four members of the Court urged that, regardless of the legislative history of a statute, no law should be deemed to abrogate state sovereign immunity unless it made "express provision for monetary recovery against the states." 437 U.S. at 706. (Powell, J., dissenting). The majority, however, declined to apply that standard to the

Civil Rights Attorneys' Fees Act at issue in Hutto, holding:

The Act itself . . . applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States. 437 U.S. at 694.

In concluding that the Civil Rights Attorneys' Fees Act did apply to the states, the Court did not purport to apply a standard of construction different from that which would have been applicable to any other class of defendants.

If the Court has adopted such a special rule of construction, that did not clearly occur until Quern v. Jordan, 440 U.S. 332 (1979). Petitioner suggests that Quern holds that a statute will not be deemed to render a state subject to suit unless it both contains a special reference to states as being among the entities

subject to suit, and is based on a legislative history in which Congress carefully considered that issue. (P. Br. 33, 38) On petitioner's view a statute which merely authorizes suit against "all" recipients of federal funds would be so deficient that the legislative history of the law would be irrelevant. (P. Br. 71-72) If Quern establishes such a standard, it has clearly departed from the rule applied by the majority in Parden. In 1964 a statute authorizing suit against all persons who violated a particular law would have been construed as authorizing a suit against a state; today such a statute, at least in the absence of some special legislative history, would apparently be given the opposite construction.

We urge that such a fundamental change in the rules of statutory construction should not be applied retroactively. Congress is ordinarily and reasonably assumed to legislate with a knowledge of the law. But the legal framework within which Congress enacts a statute to achieve a particular result is the law in existence at the time of that enactment. Members of Congress, like other officials, "cannot be expected to predict the future course of constitutional law." Procunier v. Navarette, 434 U.S. 555, 562 (1978). This Court has repeatedly recognized the public officials could not govern effectively if they acted at their peril despite complying with clearly established constitutional requirements. Scheuer v. Rhodes, 416 U.S. 232 (1974). Congress would be equally obstructed in

carrying out its constitutional responsibilities if it were required to foresee changes in the rules of construction, or if such changes were applied retroactively to alter the meaning of previously enacted statutes.

A majority of this Court may now reject the standard and result in Parden v. Terminal Railway. But when section 504 was enacted, Parden was "the reigning constitutional theory of [the] day." Quern v. Jordan, 440 U.S. at 342 n. 14. Neither Petty nor Parden had required that the language or legislative history of a federal statute refer to abrogating the immunity of a state in order for that law to achieve that result. Under Parden a general statute was construed to abrogate such immunity "in the absence of express provision to the contrary." 377 U.S. at

190. Section 504 contained no such exception, and Congress was entitled to assume that it would be construed in the same manner as had the FELA.

To apply Quern retroactively to section 504 would render that statute literally meaningless in many circumstances which Congress clearly intended would be covered by the law. In Employees

and Edelman the state programs at issue and Edelman the state and the plaintiffs were ongoing activities, and the plaintiffs had a permanent relationship with the programs involved. Thus in both cases a prospective injunction under 42 U.S.C. § 1983 could provide substantial relief, as could a prospective injunction under 42 U.S.C. § 1983 could provide substantial relief, assuring the workers in Employees the minimum wage mandated by the FLSA, and assuring the workers in Employees the minimum wage mandated by the FLSA, and guaranteeing to the disabled plaintiffs in Edelman the benefits established by the Social Security Act. But many of the Social Security Act. But many of the

BEST AVAILABLE COPY

federally assisted activities covered by section 504 are not permanent entitlement programs like Social Security, but short term grants for projects to be completed in a few years or less. Litigation to enforce section 504 often takes considerably longer to resolve; the five section 504 cases heard by this Court had been pending an average of 5 years², and only one had yet been resolved on the merits by the lower courts.³ Thus as a practical matter a final decision granting "prospective" injunctive relief will often come only after the program at issue has been

² Consolidated Rail Corp. v. Darrone 79 L.Ed.2d 568 (1984) (6 years); Alexander v. Choate, ___ U.S. ___ (1985) (5 years); Scanlon v. Atascadero State Hospital, No. 84-351 (7 years); Southeastern Community College v. Davis, 442 U.S. 397 (1979) (4 years); Camenisch v. University of Texas, 451 U.S. 390 (1981) (3 years).

³ Southeastern Community College.

terminated; in such a case prospective relief would quite literally be meaningless. A state agency operating such a short term project, once assured that there could be no retrospective redress for a violation of section 504, would simply have no incentive to obey the law.

Even where a state is operating a permanent program, the interests of certain types of beneficiaries are so inherently transitory that for them prospective relief would also be meaningless. A student in need of special assistance to benefit from a federally assisted college education cannot defer his or her education until a section 504 claim has been resolved; by the time such a claim has been finally decided, and a court is ready to provide prospective relief, the student will often have

graduated. Job applicants, such as respondent Scanlon, only rarely have an interest in prospective judicial relief awarded years after the original act of discrimination. Both economic necessity, and the obligation to mitigate damages, compel a victim of section 504 hiring discrimination to seek other work. Ford Motor Co. v. EEOC, 458 U.S. 219, 232-233 (1982). In the instant case the position for which respondent Scanlon applied in 1978 was that of a "graduate student assistant" (J.A. 9). We are advised by counsel for respondent that Mr. Scanlon has long since completed his education and is no longer a graduate student. Today, some seven years after his claim arose, respondent, like most rejected job applicants, would obtain no apparent benefit from prospective relief

directing petitioner to refrain from discrimination in the hiring of graduate student assistants. "For people in [Scanlon's] shoes, it is damages or nothing." Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). Congress did not intend in enacting section 504 to forbid discrimination by state agencies on the basis of handicap and yet simultaneously withhold what would frequently, as here, be the only meaningful remedy.

To apply Quern retroactively would also wreak havoc throughout the United States Code. The great majority of all statutes now on the books were enacted prior to Quern. Congress could not have known when it adopted the hundreds of laws that would be affected that this Court would hold in 1979 that a particular form

of language or legislative history would be required to abrogate a state's immunity. Retroactive application of Quern would require Congress to reappraise and reenact large portions of the federal code merely to restore the original meaning of laws enacted years or decades prior to Quern.

The particular result in Quern did not necessarily turn on an application, retroactive or otherwise, of the standards there suggested. Section 1983, the statute at issue in Quern, has long been construed to incorporate the common law immunities which prevailed in the states in 1871. Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators). Since sovereign immunity was the prevalent if not universal rule among the states in that era, Quern may be justified as no

more than an application of the same principles that had governed in Imbler and Tenney. Quern itself emphasized that statutes were to be construed in light of the law prevailing when they were enacted, not on the basis of legal developments that lay in the future. 440 U.S. at 342 n. 14.

Petitioner and the United States suggest that the standard suggested by Quern may to some degree have been presaged by the holdings in Employees,⁴ Edelman, Fitzpatrick and Hutto. Any hint that might have been gleaned from those cases as to what lay ahead fell far short "clearly established" rule this Court has

⁴ Petitioner appears to urge that the rule in Quern was preordained by Edelman v. Jordan (P. Br. 37-38). Edelman, like Quern, was decided after the enactment of section 504.

previously required. Procunier v. Navarette, 434 U.S. 555, 563-65 (1978).

The seeds of almost any decision are to be found in earlier precedent, but that by itself surely is insufficient to put public officials on notice as the manner and direction in which the law will grow. In the years between Employees and Quern many lower courts did not understand there to be a requirement of express language or legislative history, and statutes involving neither continued to be construed as
5
abrogating state sovereign immunity.

5

See, e.g., Green v. State of Utah, 539 F.2d 1266, 1273 (10th Cir. 1976) (sale of stock under Securities Act of 1973); Jennings v. Illinois Office of Education, 589 F.2d 935, 936 (7th Cir. 1979); Mills Music, Inc. v. State of Arizona, 591 F.2d 1278, 1283-84 (9th Cir. 1979); Witter v. Pennsylvania National Guard, 462 F. Supp. 279, 306 (E.D.Pa. 1978); Camacho v. Public Service Comm'n, 450 F. Supp. 231, 234 (D. Puerto Rico 1978)

Commentators expressed considerable uncertainty about the applicable rule of construction.⁶ Quern itself described Hutto as involving a disagreement about the rule laid down in Edelman. 440 U.S. at 339 n. 8. Under these circumstances Congress "could not reasonably have been expected to be aware of a constitutional [rule] that had not yet been declared." Procunier v. Navarette, 434 U.S. at 565.

Even if this Court were to hold that the standard suggested by Quern was foreseeably preordained by the decision in Employees, the application of that

⁶ Field, "The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon States", 126 U. Pa. L. Rev. 1203, 1247 (1978) (standard an "open" question); Liberman, "State Sovereign Immunity in Suits to Enforce Federal Rights", 1977 Wash. U.L.Q. 195, 251 (Employees an aberration unlikely to be followed in the future).

standard here would still be inappropriate. Employees was decided on April 18, 1973. Section 504 was drafted and reported out by the Senate Committee on Labor and Public Welfare on September 20, 1972. S. Rep. No. 93-318. The Vocational Rehabilitation Act containing section 504 was first passed by the Senate on September 26, 1972, and agreed to by the House on October 14, 1972. (118 Cong. Rec. 32279, 36409). Following a veto unrelated to section 504, the Act was again passed by the Senate and House on February 15 and 28, 1973, only to be vetoed a second time. (119 Cong. Rec. 5901, 7139); The differences between the President and Congress were resolved during 1973, and the legislation was finally signed into law on September 26, 1973. At the time

when section 504 was written and twice approved by Congress it could only have been understood as subjecting the states to suit, since Parden was then this Court's most recent Eleventh Amendment decision. To conclude that section 504 as finally approved had a different meaning, one must assume that the entire Congress changed its mind as to whether states should be subject to suit, read and understood Employees to have altered the applicable rules of construction, and then concluded that Employees had brought about precisely the desired change, all without a word being spoken on the subject in either the House or Senate. This Court has not in the past resorted to such far fetched hypotheses to interpret statutes, and it should not do so here.

II. ARTICLE I DOES NOT AUTHORIZE THIS COURT TO DIRECT CONGRESS, AS A PRECONDITION OF LEGISLATION SUBJECTING A STATE TO SUIT IN FEDERAL COURT, TO "FOCUS DIRECTLY ON THE QUESTION OF STATE LIABILITY."

Eleventh Amendment jurisprudence over the last twenty years has been driven by two very different views regarding how this Court should decide whether a statute subjects a state to suit in federal court. One approach has been essentially interpretive -- seeking merely to determine whether Congress intended that states could be sued. On that view the task before the Court is not different in kind than determining whether Congress intended to authorize suits against cities or judges or corporations. The second approach has been prescriptive -- purporting to delineate how Congress should be required to act if it wishes to authorize

suits against states. The implementation of this prescriptive approach requires that the Court first establish the rules which it wants Congress to obey and then decide whether Congress has done as required.

It remains unclear whether a majority of the Court has embraced the notion that the judiciary can insist that Congress act in a certain way if it wishes to abrogate the immunity of the states. In Parden the dissent urged that "[a] decent respect for" the Eleventh Amendment required Congress to express itself "with unmistakable clarity" when Congress desired to override that immunity. 377 U.S. at 199. The majority opinion in Employees although primarily interpretive in tone, admonished that Congress would

not be "acting responsibly" if it limited that immunity without express consideration of the financial consequences to the states. 411 U.S. at 284-85. The prescriptive view of the Court's role was articulated most clearly by the dissent in Hutto v. Finney, which proposed that the Court require Congress to use "statutory language sufficiently clear to alert every voting Member of Congress of the constitutional implications of particular legislation", 437 U.S. at 705, and explained that this rule would help "to protect the states' interests." 437 U.S. at 706 n. 4. Both Employees, 411 U.S. at 286, and Pennhurst State School & Hospital v. Halderman, 79 L.Ed.2d 67, 78 (1984), candidly expressed a "reluctance" to construe federal legislation to authorize

suits against states, a reluctance based, not on any view that a congressional intent to do so was unlikely, but apparently on the view that the authorization of such litigation was simply undesirable.

The actual decision in Quern v. Jordan is avowedly interpretive, emphasizing the probable meaning of the 1871 Civil Rights Act and its legislative history in light of then prevailing constitutional and common law principles. 440 U.S. at 341-43. Quern might also be read, as petitioner proposes, to prescribe rules for congressional action which are similar in tone to, although somewhat different in substance from, the requirements proposed by the dissents in Parden and Hutto. Quern emphasized that section 1983 "does not explicitly and by clear

language indicate on its face an intent to sweep away the immunity of the States" and "does not have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the states." 440 U.S. 345. As applied to section 1983 any such standard simply could not be a rational method of divining the intent of the forty-second Congress, since section 1983 was enacted in 1871, 19 years before the Court in Hans v. Louisiana, 134 U.S. 1 (1890), first indicated that the states enjoyed any Eleventh Amendment immunity from suits by their own citizens.

Both petitioner and the United States construe Quern as prescribing a standard which Congress must meet if it wishes to

render states subject to suit in federal court. Neither argue that when Congress enacted section 504 in 1972-73 it decided that states, unlike all other recipients of federal aid, should not be subject to suit in federal court. They urge, rather, that Congress, whatever its intent, failed to take the steps required to meet this Court's present standards. Petitioner describes the critical issue in this case to be delineating the "necessary conditions for abrogation . . . of immunity," (P. Br. 30), and characterizes this Court's decisions as prescribing what Congress "must do" "[i]f . . . Congress intends to impose a forfeiture of immunity" (P. Br. 83). The United States describes the issue as "how clear Congress must be when it abrogates states' Eleventh

Amendment immunity," (U.S. Br. 9), and declares that Congress' actual intent is simply irrelevant if the statute which it enacted failed to meet the "most exigent standard of explicit[ness]" (U.S. Br. 3).

Although we disagree with petitioner's and the United States' view regarding what the standard ought to be, we concur in their view that the type of standard which they propose can only be understood as a special judicially established requirement which Congress must meet if it wishes to subject the states to suit in federal court. Over the last two decades of Eleventh Amendment litigation, litigation which has spawned a plethora of concurring and dissenting opinions, no member of this Court has ever suggested that Congress itself attaches

overriding importance to protecting the states from suit in federal court, or regards such suits as an extreme remedial measure to be resorted to under only the most exigent of circumstances. Whatever views of state immunity may have preoccupied Patrick Henry, George Mason, and other Anti-Federalists in 1787-88, the debates of Congress in our own century reflect no similar concerns. The states rights issues which have divided Congress in recent generations have involved disputes about what action Congress could properly require the states to take, not whether such requirements, once established, should be enforced in federal court. Congress has been quite sensitive to the financial burdens that new federal legislation might impose on the states,

but that sensitivity has focussed on the costs that would be borne by states which in good faith obeyed those statutes; no similar Congressional solicitude has existed for states which, having violated those laws, might be ordered to redress the resulting injuries.

The peculiar remedial scheme that petitioner proposes, in which states may be subject to injunctions but not damage awards, while all other institutions violating the law are subject to both, cannot plausibly be described as a remedial approach so long adhered to by Congress as to be presumed to be the desired scheme in all legislation. On the contrary, petitioner cannot point to a single statute which expressly makes any such distinctions as to the relief available against various types of defendants, and

so far as we are aware none exists. When Congress wishes to limit judicial relief to injunctions, it has done so expressly, and has applied that limitation to suits against all defendants.⁷ Typically such limitations have been utilized where the underlying violation, such as exclusion from a restaurant on the basis of race, was unlikely to cause substantial monetary damages. Similarly, when Congress has had reservations about subjecting the states to a particular statutory regulation, it has chosen, not to require the state to obey and then exempt it from enforcement, but to completely exempt the state from

⁷

See, e.g., Title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-3(a); 16 U.S.C. § 1540(g)(1); 49 U.S.C. §§ 1686, 2014.

coverage by the law at issue.⁸ Significantly such exemptions have traditionally been extended to local governments as well as the states, a practice clearly unrelated to any Eleventh Amendment principle.

Petitioner asserts that "Congress does know how to provide at least the foundational language for an attempt at abrogation of States' immunity." (P. Br. 59-60). This is an artful suggestion that Congress understands that this Court requires it to legislate in a special way if it wishes to override state immunity. Petitioner's use of the term "attempt" aptly captures the nature of the proposed approach, reflecting the very real possibility that a statute intended to

⁸ This was true of both Title VII of the 1964 and the Fair Labor Standards Act in the form in which they were first enacted.

achieve such abrogation might be inoperative because the framers failed to utilize certain judicially mandated⁹ "foundational language." Thus petitioner is not the least embarrassed that the the decision in Employees, the well spring of modern Eleventh Amendment jurisprudence, was immediately overruled by Congress. (P. Br. 58-59). To petitioner that result indicates not that the Court erred in "interpreting" the Fair Labor Standards Act but that the Congress which adopted the Act had erred in not using the requisite "foundational language".

This argument illustrates the serious constitutional problems inherent in the position proposed by petitioner and by the

⁹ See also P. Br. 61 (requirements for "a successful expression of Congressional abrogation") (Emphasis added).

dissenters in Parden and Hutto. Under Article I legislation will become effective if three conditions are met: a statute whose literal language encompasses the result intended by Congress must be approved by the House, approved by the Senate and, ordinarily, approved by the President. That is all that is necessary for a statute authorizing federal jurisdiction over suits against almost any defendant, and a statute authorizing suit against "any person" who took certain action, since literally all inclusive, would suffice to encompass all individuals and entities. But on petitioner's view Congress must take either or perhaps both of two additional steps if it wishes to enact a law extending federal jurisdiction to suits against states. First, states must be specially listed as a defendant

subject to suit; as a matter of constitutional law "any person" is to mean "any person other than a state." Second, Congress must expressly discuss the consequences of rendering the states subject to suit and do so in a recorded debate or some other fashion demonstrable in court. Absent either of these requirements, apparently, a statute intended to render the states subject to suit would simply be of no effect.

We do not believe that this Court is authorized to mandate any such special legislative procedures. Article I provides the Congress, not this Court, with the federal legislative power, and leaves the framing of statutes and the procedure for enactment to Congressional discretion. Article I does not require

Congress to utilize "foundational language" or any particular technical formula in drafting legislation, or to list specially certain types of potential defendants under proposed legislation. Similarly, Article I does not mandate that Congress record its debates or issue written committee reports, and the courts are not at liberty to partially nullify legislation because Congress has failed to debate a topic that may be of particular interest to the judiciary. Such rules might in some instances prevent the enactment of unwise legislation, as could a practice of requiring that three-quarters of the House and Senate approve any bill, but these simply are not the procedures contained in Article I.

The dissenting opinion in Hutto offers the following justification for requiring the special legislative language rule there proposed:

By making a law unenforceable against the states unless a contrary intent were apparent, in the language of the statute, the clear statement rule . . . ensure[s] that attempts to limit state power [are] unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests. 437 U.S. at 706 n. 4. (Emphasis in original).

On this view requiring that legislation contain a special reference to lawsuits against states is deemed desirable because it maximizes the likelihood that the legislation will be defeated. The structuring of the legislative process, however, is an internal matter to be

regulated by the House and Senate, not by the courts. Whether to require, permit, or curtail congressional discussion of a particular topic is a decision which Article I entrusts to the legislative branch. The judiciary is no more authorized to override those decisions than it is to alter the number of votes required to end a filibuster, or to overturn the procedures established by the House Rules Committee for the consideration of a bill.

Congress was fully responsive to the interests of the states in the days of Parden v. Terminal Railway, and remains so today. The Constitution assures that that responsiveness will exist, however, not by authorizing judicial control over the procedures of the national legislature, but by providing that the members of the

House and Senate are to be elected from the states that will be affected by any federal legislation. Garcia v. San Antonio Metropolitan Transit Authority, No. 82-1913, slip opinion p. 28. The views of state officials carry considerable weight when Congress undertakes the often difficult task of striking the proper balance between state and federal interests and policies. Where, however, Congress has resolved, as in section 504, to forbid state recipients of federal assistance to discriminate against handicapped individuals, it is exceedingly inappropriate, and not in accordance with the Constitution, for this Court to adopt a rule of construction whose avowed purpose is to provide "the greatest

opportunity" to those who might oppose legislation authorizing full judicial relief for a state violation of that law.

We believe that this Court should limit itself to interpreting the law, its proper constitutional role, and should eschew maxims of construction framed for the purpose of increasing the likelihood that statutes will be construed to treat state agencies differently than other potential defendants. When Congress approves a bill whose broad language makes no distinctions among those who may be subject to suit in federal court, it has done all that Article I requires in order to enact legislation rendering the states liable to such suits. The judiciary has no more authority to establish additional requirements than Congress or the President have to dispense with requirements

that they may find inconvenient. Immigration and Naturalization Service v. Chadha, 77 L.Ed.2d 317 (1983).

CONCLUSION

For the above reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

BONNIE MILSTEIN
Center for Law and
Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

Counsel for Amici

FEB 22 1985

ALEXANDER L. STEVENS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ATASCADERO STATE HOSPITAL
and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
Petitioners,
—v.—
DOUGLAS JAMES SCANLON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION FOUNDATION AND THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION OF SOUTHERN
CALIFORNIA AS AMICI CURIAE
SUPPORTING AFFIRMANCE**

PAUL L. HOFFMAN
MARK D. ROSENBAUM
American Civil Liberties
Union Foundation of
Southern California
633 South Shatto Place
Los Angeles, CA 90005
(213) 487-1720

DAVID L. SHAPIRO
(Counsel of Record)
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4618

BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

25RP

INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of more than 250,000 members dedicated to the protection of civil liberties and civil rights. The ACLU Foundation of Southern California is a state affiliate of the ACLU. Either as counsel for a party or as *amicus curiae*, the ACLU has frequently asserted the federal statutory and constitutional rights of handicapped persons. The ACLU has also previously filed briefs in this Court concerning the proper scope of the Eleventh Amendment.

With the consent of the parties, indicated by letters we have lodged with the Clerk of the Court, we file this brief *amici curiae* to bring our experience to bear on the important questions presented by this case.

TABLE OF CONTENTS

	PAGE
INTEREST OF AMICI	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Congress Has Effectively Abrogated Eleventh Amendment Immunity in Private Suits for Viola- tion of Section 504 of the Rehabilitation Act	4
A. Congress Has Authorized a Private Remedy for Violation of Section 504 Against All Re- cipients of Federal Assistance, Including the States and Their Departments	6
B. Congressional Abrogation of Eleventh Amendment Immunity in This Case Does Not Require State Consent to Be Effective.....	11
C. If State Consent is Required, It May Be In- ferred From the Continued Acceptance of Federal Assistance With Notice of the Condi- tions Imposed by Federal Law	12
II. This Case Affords an Opportunity to Clarify the Scope and Application of the Eleventh Amend- ment.....	14
CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases	PAGE
<i>Alabama v. Pugh</i> , 438 U.S. 781 (1978).....	4, 9, 16
<i>Alexander v. Choate</i> , 53 U.S.L.W. 4072 (U.S. Jan. 9, 1985).....	7, 9
<i>Bossier Parish School Bd. v. Lemon</i> , 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967).....	8
<i>Brown v. Sibley</i> , 650 F.2d 760 (5th Cir. 1981)	5
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979)	8
<i>Chisholm v. Georgia</i> , 2 Dall. (2 U.S.) 419 (1793)	15
<i>Consolidated Rail Corp. v. Darrone</i> , 104 S. Ct. 1248 (1984)	2
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974)	4, 13
<i>EEOC v. Wyoming</i> , 460 U.S. 226 (1983)	12
<i>Employees v. Department of Public Health & Welfare</i> , 411 U.S. 279 (1973)	13, 14
<i>Ex parte Young</i> , 209 U.S. 123 (1908).....	16
<i>Fitzpatrick v. Bitzer</i> , 427 U.S. 445 (1976).....	4, 11
<i>Florida Dep't of Health & Rehabilitative Services v. Florida Nursing Home Ass'n</i> , 450 U.S. 147 (1981) ...	10, 13
<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1980)	12
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890).....	4, 15, 17, 18
<i>Hospital Building Co. v. Trustees of the Rex Hospital</i> , 425 U.S. 738 (1976)	1
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978)	9, 10, 11
<i>Lau v. Nichols</i> , 414 U.S. 563 (1974)	8
<i>Lloyd v. Regional Transportation Authority</i> , 548 F.2d 1277 (7th Cir. 1977)	12

	PAGE
<i>Milliken v. Bradley</i> , 433 U.S. 267 (1977).....	4
<i>Mills Music, Inc. v. Arizona</i> , 591 F.2d 1278 (9th Cir. 1979).....	5
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979).....	16
<i>Parden v. Terminal Railway</i> , 377 U.S. 184 (1964)....	5, 10, 13
<i>Parks v. Pavkovic</i> , 536 F. Supp. 296 (N.D. Ill. 1982)...	12
<i>Peel v. Florida Dep't of Transportation</i> , 600 F.2d 1070 (5th Cir. 1979).....	13
<i>Pennhurst State School & Hospital v. Halderman</i> , 104 S. Ct. 900 (1984)	14, 16
<i>Quern v. Jordan</i> , 440 U.S. 332 (1979).....	9
<i>Scanlon v. Atascadero State Hospital</i> , 677 F.2d 1271 (9th Cir. 1982), <i>vacated and remanded</i> , 104 S. Ct. 1583, <i>on remand</i> , 735 F.2d 359 (9th Cir. 1984).....	2
<i>Southeastern Community College v. Davis</i> , 442 U.S. 397 (1979)	13
Statutes and Regulations	
Education Acts, 20 U.S.C. §§ 1401 <i>et seq.</i>	12
Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 <i>et seq.</i>	5, 6
Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794	<i>passim</i>
29 U.S.C. § 794a	7
Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d <i>et seq.</i>	5, 6, 7, 8
42 U.S.C. § 2000e-5(g).....	11
42 Fed. Reg. 22677 (May 4, 1977), 45 C.F.R. § 84.3(f)...	8

Legislative Materials

Senate Report No. 890, 95th Cong., 2d Sess. 19 (1978)	8, 9
Senate Report No. 1297, 93d Cong., 2d Sess. 39-40 (1974)	6, 8
110 Congressional Record 10075-76 (1964).....	8
110 Congressional Record 1378 (1964)	8
117 Congressional Record 45974-75 (1971).....	12
118 Congressional Record 525 (1972)	12
119 Congressional Record 24587 (1973)	6
124 Congressional Record 30346 (1978)	7
124 Congressional Record 30347 (1978)	9
Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess (1977).....	7

Other Authorities

Engdahl, <i>Immunity and Accountability for Positive Governmental Wrongs</i> , 44 U. Colo. L. Rev. 1 (1972)	14
Field, <i>The Eleventh Amendment and Other Sovereign Immunity Doctrines</i> , 126 U. Pa. L. Rev. 515 (1977) (Part I), 126 U. Pa. L. Rev. 1203 (1978) (Part II) ...	14, 15, 17
Fletcher, <i>A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction</i> , 35 Stan. L. Rev. 1033 (1983)...	14
Gibbons, <i>The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation</i> , 83 Colum. L. Rev. 1889 (1983).....	14, 15

	PAGE
C. Jacobs, <i>The Eleventh Amendment and Sovereign Immunity</i> (1972)	14
Orth, <i>The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power</i> , 1983 U. Ill. L. Rev. 423	14
Shapiro, <i>Wrong Turns: The Eleventh Amendment and the Pennhurst Case</i> , 98 Harv. L. Rev. 61 (1984)	14, 16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-351

ATASCADERO STATE HOSPITAL
and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
Petitioners,

—v.—

DOUGLAS JAMES SCANLON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION FOUNDATION AND THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION OF SOUTHERN
CALIFORNIA AS AMICI CURIAE
SUPPORTING AFFIRMANCE**

STATEMENT OF THE CASE

In November 1979, Douglas Scanlon filed this suit in a California federal district court against the Atascadero State Hospital and the California Department of Mental Health.¹ He

1. The summary of the case in this statement is drawn from Scanlon's complaint. See J.A. 2-23. Since the case arises on a motion to dismiss, the allegations of the complaint are taken to be true for purposes of this proceeding. See *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 740 (1976).

(footnote continued on following page)

alleged in his complaint that he suffers from diabetes mellitus and loss of vision in one eye, that in February 1978 he applied for a position as a graduate student assistant in recreation therapy at Atascadero Hospital, and that after a physical examination, the hospital withdrew a job offer it had made because his diabetes was "uncontrolled" and because he lacked vision in one eye.

Scanlon then complained to the regional Office of Civil Rights of the Department of Health, Education and Welfare. That office determined that the withdrawal of the job offer violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which provides that "[n]o otherwise qualified handicapped individual . . . shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." When conciliation efforts failed, the present action to redress the violation was brought.² The complaint prayed for a declaratory judgment and injunctive relief, as well as backpay, "any further compensatory damages," costs, and reasonable attorney's fees.

The defendants' motion to dismiss was granted by the district court on the grounds (1) that Section 504 did not prohibit discrimination against the handicapped in a federally assisted activity unless a primary purpose of that federal assistance was to provide employment, and (2) that the action was barred by the Eleventh Amendment. The Court of Appeals affirmed on the first of these grounds, 677 F.2d 1271 (9th Cir. 1982), but after the decision in *Consolidated Rail Corp. v. Darrone*, 104 S. Ct. 1248 (1984), this Court vacated and remanded for reconsideration. 104 S. Ct. 1583 (1984). On remand, the Court of Appeals concluded (1) that under *Darrone*, Section 504 was applicable even if the primary purpose of the federal assistance was not to provide employment, and (2) that the suit was not barred by the Eleventh Amendment.

The Department of Mental Health is the state agency responsible for supervising and administering the Atascadero Hospital. Both defendants allegedly receive funds from the federal government.

2. Scanlon also alleged in his complaint that the defendants' actions violated two California statutes.

735 F.2d 359 (9th Cir. 1984). The latter determination is now before this Court for review.

SUMMARY OF ARGUMENT

The Rehabilitation Act of 1973 and its amendments represent a major effort by Congress to deal with one of the enduring social problems of our day—that of enabling the handicapped to lead full and useful lives. As an essential part of this effort, Congress prohibited discrimination against the handicapped not only by federal agencies and contractors but also by all recipients of federal financial assistance, and authorized a private remedy against any recipient who violated that prohibition.

The language and legislative history of the act and its amendments demonstrate that the states and their departments, as principal recipients of federal assistance, fall within the scope of that statutory prohibition and of the private remedy afforded for its violation. Thus Congress, acting pursuant to its constitutional power under Section 5 of the Fourteenth Amendment and the spending clause of Article I, has effectively abrogated Eleventh Amendment immunity when such a remedy is sought.

Since congressional abrogation of Eleventh Amendment immunity in this case is based in substantial part on congressional power under the Fourteenth Amendment, state consent to suit is not required in order for the abrogation to be effective. Even if consent were required, it may properly be inferred from continued state acceptance of federal financial assistance with full notice of the conditions imposed on acceptance by federal law.

Although existing law supports the conclusion that California and its departments may not claim immunity in this action, the present state of Eleventh Amendment doctrine is complex and confusing. Recent studies have laid the foundation for an interpretation of the Amendment that is more closely tied to its language and intended purpose, and the present case provides an excellent vehicle for reconsidering existing doctrine and

clarifying this important area of constitutional law. Properly applied, the Eleventh Amendment is not a bar to this action because (1) it is not a suit against a state by a citizen of another state, and (2) federal jurisdiction is based not on the identity of the parties but on the presence of a federal question. The remaining issue—whether the state may claim its common law immunity from an unconsented suit—raises a straightforward question of statutory construction to be decided on the basis of the language and purpose of the relevant law. Here, that immunity must yield to the congressional decision to provide a federal forum for the effective vindication of federal rights.

ARGUMENT

I. Congress Has Effectively Abrogated Eleventh Amendment Immunity in Private Suits for Violation of Section 504 of the Rehabilitation Act.

Under existing precedent, a state may claim Eleventh Amendment immunity from private suit in a federal court even if the suit is brought by a citizen of that state, and even if the basis of jurisdiction is that the action arises under federal law. See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890); *Edelman v. Jordan*, 415 U.S. 651 (1974).³ But this Court has recognized the power of Congress, when acting under Section 5 of the Fourteenth Amendment, to abrogate that immunity in order to implement the Amendment's requirements. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Moreover, the Court has upheld

3. It is not entirely clear whether this conclusion is derived directly from the Eleventh Amendment or indirectly from the doctrine of sovereign immunity which the Eleventh Amendment is said to reflect. For simplicity, the rule will be referred to here as one of Eleventh Amendment immunity.

In the present case, the only defendants are agencies of the state; no state officials have been joined. Thus if Eleventh Amendment immunity applies, none of the relief sought may be obtained, even though some aspects of that relief might be available in a suit against state officials. Compare *Alabama v. Pugh*, 438 U.S. 781 (1978), with *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977).

congressional action subjecting a state to suit as part of the exercise of other powers delegated to Congress, at least when the conduct of the state can fairly be said to constitute consent. See, e.g., *Parden v. Terminal Railway*, 377 U.S. 184 (1964).⁴

Congress, in the relevant sections of the Rehabilitation Act, has effectively exercised this power to abrogate Eleventh Amendment immunity. This statute represents a major legislative effort to protect the handicapped against discrimination and thus to ensure to them the equal protection of the laws guaranteed by the Fourteenth Amendment. An essential aspect of this effort is the authorization of a private remedy against any recipient of federal funds who engages in prohibited discrimination. And like the other important civil rights statutes on which it is patterned,⁵ the Rehabilitation Act is significantly directed at the states themselves as principal recipients of federal funds.

Congressional authority to enact Section 504, as it applies to the states and their departments, rests not only on Section 5 of the Fourteenth Amendment but also on the spending power in Article I, Section 8. Whether or not Congress has authority to abrogate state sovereign immunity without state consent in action taken under the spending power, continued acceptance of federal assistance by a state after Congress has made its purpose clear constitutes effective consent to the bringing of a citizen suit in federal court.

These conclusions are not simply appropriate to the interpretation of the Rehabilitation Act. They are essential if the worthy purpose of that statute is to be realized.

4. Cf. *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979) (power of Congress under the copyright and patent clause of Article I, Section 8).

5. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* See *Brown v. Sibley*, 650 F.2d 760, 767 (5th Cir. 1981) (noting "virtual identity between the discrimination provisions of Section 504 and those of Title VI and Title IX").

A. *Congress Has Authorized a Private Remedy for Violation of Section 504 Against All Recipients of Federal Assistance, Including the States and Their Departments.*

As originally enacted in 1973, the Rehabilitation Act envisioned a far-reaching program to increase opportunities for the handicapped—by providing programs and funding to the states, by authorizing federal agencies to implement the act, and by imposing obligations on federal agencies, federal contractors, and recipients of federal funds. The prohibition of discrimination in Section 504 formed a critical part of this vision. As Senator Taft, a member of the Committee on Labor and Public Welfare, stated (119 Cong. Rec. 24587 (1973)):

[I]f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote all our energy toward the elimination of the most disgraceful barrier of all—discrimination.

The 1973 Act did not expressly provide for private enforcement of the duties imposed by Section 504, but Congress left no doubt of its purpose on this score when it enacted a series of amendments to the Act in 1974. The Senate Report accompanying those amendments, S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40 (1974), noted that Section 504 was almost identical to the anti-discrimination provisions of Title VI of the 1964 Civil Rights Act, § 601, 42 U.S.C. § 2000d, and Title IX of the 1972 Education Amendments, § 901, 20 U.S.C. § 1681, and then continued:

The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts. . . . This approach . . . would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, *and permit a judicial remedy through a private action.* (Emphasis added.)

If the history of this statute ended here, some question might be raised about the demonstration of congressional purpose, since the clearest evidence was a statement in a committee report issued a year after Section 504 was enacted into law.⁶ But Congress went on in the course of further amendments in 1978 to make its purpose explicit. After hearings that focused in significant part on the need for an express private remedy and for recovery of attorney's fees by successful litigants,⁷ Congress added a new Section 505, 29 U.S.C. § 794a. This section provides that the remedies, procedures, and rights in Title VI of the 1964 Civil Rights Act "shall be available to any person aggrieved by any act or failure to act by *any recipient* of Federal assistance" under section 504, 29 U.S.C. § 794a (a)(2) (emphasis added), and further provides that in any action to enforce the act, the court has discretion to allow "the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," 29 U.S.C. § 794a(b).

Senator Cranston, the author of the attorney's fee provision, explained its purpose in detail on the floor of the Senate, saying that "[p]rivate enforcement of these title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform." 124 Cong. Rec. 30346 (1978).

The reference in Section 505 to Title VI of the 1964 Civil Rights act is especially significant. Although Title VI did not explicitly provide a private remedy for its violation, federal courts, including this Court, have consistently found such a

6. This Court has recently noted, however, that since the 1974 amendments were "virtually contemporaneous" with the 1973 Act, "the amendments and their history do shed significant light on the intent with which § 504 was enacted." *Alexander v. Choate*, 53 U.S.L.W. 4072, 4077 n.27 (U.S. Jan. 9, 1985).

7. See *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 95th Cong., 1st Sess. (1977).

remedy to be available,⁸ and Congress in 1974 and again in 1978 acted on the understanding that the remedy did exist.⁹

The reference to Title VI also underscores the intent of Congress to make this private remedy available against the states and their departments. The major purpose of Title VI was to end discrimination on the basis of race, gender, and national origin by state and local governments, the principal recipients of federal funds. As Senator Javits stated during the debates, "We are primarily trying to reach units of government, not individuals." 110 Cong. Rec. 13700 (1964); *see also id.* at 10075-76 (Letter of Attorney General Kennedy to Senator Cooper stating that "it is to discrimination by such State and local agencies that title VI is basically directed.").

Indeed, the language of Section 505 itself leaves no doubt of Congress's intent. The provision authorizes a remedy against "any recipient" of federal funds, and regulations issued by the Department of Health, Education and Welfare in 1977 had explicitly defined "recipient" to include "any state or its political subdivision, any instrumentality of a state or its political subdivision . . . or any person to which Federal financial assistance is extended . . ." 42 Fed. Reg. 22677 (May 4, 1977), 45 C.F.R. § 84.3(f). And the Senate Report accom-

8. *See, e.g., Lau v. Nichols*, 414 U.S. 563 (1974); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

9. *See* S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40 (1974); S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978); *cf. Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) ("We have no doubt that [in 1972] Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.").

The United States suggests in its *amicus* brief in this Court, U.S. Br. at 13, that Congress may have had some question in 1978 about the availability of a private remedy under Title VI. This suggestion is rebutted by the legislative history of the amendments. As noted by the United States in its *amicus* brief in support of Scanlon in the court below (p. 33): "When Section 505(a)(2) was enacted in 1978, Congress understood that Title VI provided a private cause of action and intended, as it had indicated in 1974, that such a remedy should be available under Section 504."

panying the 1978 amendments expressly referred to these regulations and to their conformity with regulations promulgated under Title VI. See S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978).¹⁰

Finally, Senator Cranston, in his remarks on the floor of the Senate, spoke directly of actions against states to enforce Section 504:

[W]ith respect to State and local bodies or State and local officials, attorney's fees . . . would be collected from the official . . . or from the State or local government—regardless of whether such agency or government is a named party. The authorization of attorney's fees under proposed § 505(b) in cases brought to enforce title V is within the power of Congress under among other things, section 5 of the 14th Amendment. Thus, in accordance with the Supreme Court's decision in *Hutto v. Finney* [437 U.S. 678 (1978)], the 11th Amendment is no bar to the recovery of attorney's fees under proposed section 505(b) . . .¹¹ 124 Cong. Rec. 30347 (1978).

This Court has held that congressional purpose to abrogate Eleventh Amendment immunity must be clearly shown. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 343-45 (1979). But the

10. This Court has on several occasions recognized these regulations as an important source of guidance on the meaning of the 1978 amendments. See, e.g., *Alexander v. Choate*, 53 U.S.L.W. at 4076 n.24.

11. Both the petitioner and the United States (in its *amicus* brief in this Court) seek to minimize the importance of this statement by pointing to its emphasis on fee awards. This effort to distinguish away even a direct reference to the abrogation of the Eleventh Amendment must fail. Senator Cranston's point was that attorney's fees could be recovered from state funds under this section whether or not a Title V enforcement action was brought directly against the state as a "named party." His assumption that an enforcement action could be brought against the state as a named party in an appropriate case is consistent only with congressional abrogation that is broader than the mere authorization of fees; in the absence of such abrogation even prospective relief may be sought only against individuals. See *Alabama v. Pugh*, 438 U.S. 781 (1978).

Court has never held that abrogation of immunity must be stated in so many words in the text of the statute in order to be effective. On the contrary, the Court has found legislative abrogation even in the absence of express statutory language. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978). And despite petitioner's efforts to explain *Hutto* as a case relating solely to litigation costs, the Court in that case emphasized that its refusal to require express abrogation would have obtained "[e]ven if we were not dealing with an item such as costs." *Id.* at 698 n.31.¹²

To insist on greater specificity than exists in this case would be to demand a degree of precision that can only frustrate the effectuation of congressional purpose. Congress provided for § 504 actions against state agencies because the availability of a private remedy against an offending state is critical to the fulfillment of the goals of Section 504. The states and their departments head the list of federally assisted grantees, and the alternative tool of administrative enforcement—a cutoff of federal funds—is too Draconian to be useful in all but the most flagrant and pervasive instances of unlawful conduct.

In its *amicus* brief in this Court, the United States attempts to make the requirement of specificity even more onerous and unrealistic. It is not sufficient, the United States suggests, for the language and history of a statute to make clear the purpose of Congress to abrogate immunity and to subject the state to

12. The Court in *Hutto* pointed to the strength of the legislative history and to the source of congressional action in Section 5 of the Fourteenth Amendment. Cases in which greater emphasis has been put on the importance of express language, e.g., *Florida Dep't of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981), have not been cases in which Congress was legislating in the exercise of authority under Section 5. Cf. *Parden v. Terminal Railway*, 377 U.S. 184 (1964) (subjecting state to suit under the Federal Employers Liability Act).

suit; Congress “must clearly express an intention to permit *retrospective damage suits* in federal court if it so intended.” U.S. Br. at 16 n.10 (emphasis added). This argument contains two flaws. First, it relies on cases in which congressional authority to legislate did not derive from Section 5 of the Fourteenth Amendment. *See supra* note 12. Second, even cases in which Congress undeniably intended to authorize suit would often fail this test. For example, in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), Congress had not explicitly provided that states were subject not only to actions for prospective relief for violations of Title VII but also to the monetary awards authorized in 42 U.S.C. § 2000e-5(g). Yet the Court quite properly held that Congress had intended to subject states to such suits, and in so holding the Court gave full effect to the legislative purpose.¹³

B. *Congressional Abrogation of Eleventh Amendment Immunity in This Case Does Not Require State Consent to Be Effective.*

When Congress abrogates Eleventh Amendment immunity in the exercise of its power under Section 5 of the Fourteenth Amendment, state consent to that abrogation is not required. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Hutto v. Finney*, 437 U.S. 678 (1978). Indeed, if consent were a condition of abrogation in this circumstance, effective implementation of the Fourteenth Amendment might be held hostage to the will of the states themselves.

For the first time, petitioners have suggested in their brief in this Court that authority for application of the Rehabilitation Act to the states does not derive from Section 5 but only from

13. Since only state agencies and not state officials have been sued in the present action, the Eleventh Amendment, if applicable, may bar all claims for relief, prospective as well as retrospective. *See supra* note 3. The United States recognizes, U.S. Br. at 16 n.11, that this inappropriate consequence may flow from acceptance of its argument that Congress has not done enough to make clear its desire to subject the states to suits for retrospective relief.

the spending power in Article I. But there is no doubt that the desire of Congress to secure equal protection of the laws for the handicapped was an important basis of this legislation. This idea was expressed by several sponsors of the original proposals out of which the Act evolved,¹⁴ as well as by Senator Cranston in the remarks quoted above, *see supra* at 9. Moreover, the Act's provisions, which are based on extensive consideration of the denial of opportunity to the handicapped by governmental and private agencies, are intimately related to the protections afforded by the Education Acts, 20 U.S.C. §§ 1401 *et seq.* And the origin of those laws in the Fourteenth Amendment has been judicially recognized. *See, e.g., Parks v. Pavkovic*, 536 F. Supp. 296, 306-11 (N.D. Ill. 1982).

The case is thus similar to *Fullilove v. Klutznick*, 448 U.S. 448 (1980), in which the Court concluded that the basis of the congressional program there at issue lay in the commerce power as the program related to private contractors and in "the power to enforce the equal protection guarantees of the Fourteenth Amendment insofar as the program objectives pertain to the action of state and local grantees." 448 U.S. at 475.¹⁵

C. *If State Consent is Required, It May Be Inferred From the Continued Acceptance of Federal Assistance With Notice of the Conditions Imposed by Federal Law.*

Even were the Court to conclude that Congress has not here legislated under Section 5 of the Fourteenth Amendment, the state's claim to immunity should not succeed. Assuming *arguendo* that the spending power in Article I, Section 8 were the

14. As noted in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1280 n.9 (7th Cir. 1977), Section 504 had its genesis in an attempt in 1971 and 1972 by Representative Vanik and Senator Humphrey to amend Title VI. The remarks of those sponsors, as they relate to the Fourteenth Amendment, may be found at 117 Cong. Rec. 45974-75 (1971) and 118 Cong. Rec. 525 (1972).

15. The Court has made it clear that an express statement by Congress of reliance on Section 5 is not required. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983).

sole source of congressional authority for this statute, the decisions of this Court do not clearly determine the question whether abrogation of immunity must be accompanied by state consent to suit in order to be effective. See, e.g., *Parden v. Terminal Railway*, 377 U.S. 184 (1964); *Edelman v. Jordan*, 415 U.S. 651 (1974).¹⁶ But even if state consent is required, it is clear that in appropriate cases consent may be inferred from conduct. Here, a critical combination of factors is present. First, Congress has legislated a private remedy against a class of persons ("recipients" of federal assistance) which in terms embraces the states and indeed highlights their inclusion. In this respect, the case differs from *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Florida Dep't of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981). Second, the state agencies that are defendants in this case have continued not only to carry on the normal business of government but also to accept federal assistance in the very programs and activities that are the subject of this suit. In this respect, the case differs from *Employees v. Department of Public Health & Welfare*, 411 U.S. 279 (1973). The state has therefore acted with full understanding of the consequences of its actions and with complete freedom to reject federal aid if those consequences are unacceptable. Thus the requisites of knowing consent have been made out.¹⁷

16. Cf. *Peel v. Florida Dep't of Transportation*, 600 F.2d 1070 (5th Cir. 1979) (analyzing Supreme Court authority and suggesting that state consent is not required when abrogation of immunity is based on exercise of the war power, Art. I, Section 8).

17. Indeed, it is noteworthy that the state of California, whose departments are defendants in this case, participated as an *amicus* supporting the suit of a private person under § 504 against a state agency in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Since the named defendant in that case was a state agency, an Eleventh Amendment question could have been raised, even if the sole relief sought was prospective in nature.

Moreover, given that an Eleventh Amendment defense "partakes of the nature of a jurisdictional bar," *Edelman v. Jordan*, 415 U.S. at 678, this Court could have raised the Eleventh Amendment issue in that case on its own motion. However, this Court did not do so.

II. This Case Affords an Opportunity to Clarify the Scope and Application of the Eleventh Amendment.

As shown in Part I, existing precedent fully supports the conclusion that the present suit may be brought against the state of California and its departments in a federal court. But as many commentators have observed, the present state of Eleventh Amendment jurisprudence is complex, uncertain, and confusing.¹⁸ For example, there is uncertainty about the degree of precision required for congressional abrogation of Eleventh Amendment immunity under grants of legislative power other than that in the Fourteenth Amendment, about the necessity of state consent to suit, and about the kinds of state behavior that may constitute consent in particular contexts. Moreover, individual Justices have expressed wide disagreement about the relationship of the doctrine of sovereign immunity, the Eleventh Amendment, and other provisions of the Constitution. See, for example, the several opinions in *Employees v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), and in *Pennhurst State School & Hospital v. Halderman*, 104 S. Ct. 900 (1984).

At the same time, an outpouring of scholarly research in recent years has cast new light on the purpose and scope of the Eleventh Amendment and on the place of sovereign immunity doctrine in constitutional law.¹⁹ This research strongly suggests

18. See C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1 (1972); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines*, 126 U. Pa. L. Rev. 515 (1977) (Part I), 126 U. Pa. L. Rev. 1203 (1978) (Part II); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983); Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, 1983 U. Ill. L. Rev. 423; Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61 (1984).

19. See authorities cited *supra* note 18, especially Engdahl, Field, Gibbons, and Orth.

that state sovereign immunity was not viewed by the Framers as a constitutional limitation on federal judicial power either before or after adoption of the Eleventh Amendment. It further suggests that the Eleventh Amendment itself should not be given an expansive interpretation that bears little relationship to its text. Rather it should be read, in accordance with its language, as an amendment drafted by the Federalists “in the narrowest possible form that would serve to quiet the rapidly mobilizing reaction to *Chisholm* [v. *Georgia*, 2 Dall. (2 U.S.) 419 (1793)], while leaving intact the rest of article III,”—an amendment that would “reach cases such as *Chisholm*—over which the Supreme Court’s jurisdiction was original and based solely on party status but leave intact the clauses in article III, section 2 dealing with subject matter jurisdiction, especially federal question jurisdiction.” Gibbons, *supra* note 18, at 1934.

Under this approach, the Eleventh Amendment would apply to bar a federal court suit *only* when the asserted basis of jurisdiction was that the defendant was a state and the plaintiff was a citizen of another state. Indeed, no Supreme Court decision before *Hans v. Louisiana*, 134 U.S. 1 (1890), gave the Amendment a broader reading, and the revisionism of the *Hans* decision was born out of the political controversy over repudiation of state debts in the aftermath of Reconstruction.²⁰ See Gibbons, *supra* note 18, at 1968-2003.

This recent scholarship provides a firm foundation for a restatement of the significance of the Eleventh Amendment and of sovereign immunity doctrine. Neither the Amendment nor the doctrine erects a constitutional barrier to congressional authorization of suit against a state in a federal court when that authorization is incidental to the proper exercise of any delegated power. There is no warrant for any requirement of

20. *Hans* was the first Supreme Court decision to hold that the Constitution barred a suit against a state by one of its own citizens. (There is some support for the view that even *Hans* did not hold that such a suit was constitutionally precluded, but subsequent decisions have plainly regarded it as standing for that proposition. See Field, *supra* note 18 (Part I), at 536-46 & nn. 81, 86.)

extraordinary and virtually unattainable specificity in draftsmanship or of "consent" on the part of the state when federal power is duly exercised. The question whether Congress has overridden a state's common law immunity from suit is, like any other question of statutory construction, one that involves the careful ascertainment of legislative purpose.

Existing precedent of this Court is in important ways consistent with this approach, though it often looks in conflicting directions. For example, while these *amici* believe that last Term's sharply divided decision in *Pennhurst*, *supra*, reached an unfortunate and unnecessary result, we also believe that the majority's rationale supports a fresh approach to the scope of federal authority. The great case of *Ex parte Young*, 209 U.S. 123 (1908), the *Pennhurst* Court said, rested not on the "fiction" that a government official acting in violation of law was stripped of his official authority, but rather on the clear need "to permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'" 104 S. Ct. at 910 (quoting *Ex parte Young*, 209 U.S. at 160). Recognition that the Eleventh Amendment need never be a barrier to the attainment of that goal—the effective vindication of federal rights—would thus harmonize with this understanding of *Ex parte Young*'s rationale.²¹

We submit, therefore that the time and occasion are ripe for the Court, at the least, to clarify the authority of Congress to subject the states and their departments to federal court suit.²²

21. Moreover, recognition that state sovereign immunity is not mandated by any provision of the Constitution would be fully consistent with this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), which allowed the state of Nevada to be sued in a California court without Nevada's consent. See Shapiro, *supra* note 18, at 79-80.

22. This case also affords an opportunity to rule that when the doctrine of *Ex parte Young* permits a federal court suit for prospective relief in order to vindicate federal rights, that relief may be sought not only against public officers "in their individual capacity" but also "in their official capacity," i.e., against the state itself. The current rule, reflected in *Alabama v. Pugh*, *supra* note 3, often serves as a procedural trap for the unwary.

More fundamentally, we believe the occasion is an appropriate one to reconsider the rationale of the decision in *Hans v. Louisiana*, *supra*,²³ and to hold that the Eleventh Amendment does not apply to the present suit for two independent reasons: (1) the suit is not one brought against a state by a citizen of another state, and (2) federal jurisdiction is based not on party identity but on the presence of a federal question. When the Eleventh Amendment issue is thus stripped away, the question whether the State of California can be sued without its consent, despite the traditional immunity of the state from suit, becomes a straightforward question of statutory construction which should be answered in the affirmative for reasons stated in Part I of this brief.

We have not set forth in full the historical and analytical bases for these conclusions because the relevant studies are readily at hand and because we are not sure whether the Court will find it necessary or appropriate to follow this course. But if the Court wishes to have fuller briefing and argument of these questions, we suggest that it set the case for reargument and ask the parties and *amici* to address the question whether the rationale of *Hans v. Louisiana* and related decisions should now be reconsidered.

23. Even if the rationale of *Hans* is reconsidered along the lines suggested here, alternative grounds would support the result in that case. See Field (Part II), *supra* note 18, at 1266.

CONCLUSION

For the foregoing reasons, we urge that the decision below be affirmed. If the Court believes that the case affords an opportunity for reconsideration of the rationale of *Hans v. Louisiana* and related decisions, the Court may wish to set the case for reargument and ask the parties and *amici* to address these fundamental questions of Eleventh Amendment doctrine.

Respectfully submitted,

PAUL L. HOFFMAN
MARK D. ROSENBAUM
American Civil Liberties
Union Foundation of
Southern California
633 South Shatto Place
Los Angeles, CA 90005
(213) 487-1720

DAVID L. SHAPIRO
(Counsel of Record)
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4618

BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800*

* Counsel gratefully acknowledge the assistance of Carl H. Loewenson, Jr., a law school graduate awaiting admission to the Bar of the State of New York.

No. 84-351

Office - Supreme Court, U.S.

FILED

MAR 4 1985

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

ATASCADERO STATE HOSPITAL,
AND
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
Petitioners,
v.
DOUGLAS JAMES SCANLON,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF

J. LEVONNE CHAMBERS
ERIC SCHNAPPER
NAACP Legal Defense
and Education Fund, Inc.
99 Hudson Street
New York, New York 10013
STANLEY FLEISHMAN
2049 Century Park East
Los Angeles, CA 90067

JOSEPH LAWRENCE
MARILYN HOLLE*
Western Law Center for
the Handicapped at
Loyola Law School
1441 West Olympic Blvd.
Los Angeles, CA 90015
(213) 736-1031

ALLAN IDES
MARY-LYNNE FISHER
Loyola Law School
1441 West Olympic Blvd.
Los Angeles, CA 90015

**Counsel of Record*

QUESTIONS PRESENTED

1. Did Congress abrogate the Eleventh Amendment immunity of the states by creating, pursuant to its Article I, Section 8 and Fourteenth Amendment powers, a federally enforceable cause of action against the states under Sections 504 and 505 of the Rehabilitation Act of 1973?

2. Under federal and California law did California, a recipient of federal financial assistance, waive its Eleventh Amendment immunity and consent to be sued when it engaged in an act of discrimination clearly prohibited by Section 504, and when Sections 504 and 505 create a federally enforceable private right of action?

3. Should *Hans v. Louisiana*, 134 U.S. 1 (1890), be overruled insofar as it limits federal court jurisdiction over federal question actions?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
ADDITIONAL CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. IN ENACTING SECTION 504 CONGRESS HAS ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES. SECTION 504 IS A BROADLY REMEDIAL STATUTE THAT WAS ENACTED TO HALT HANDICAP DISCRIMINATION. CONGRESS EXPRESSLY INTENDED TO LIMIT THE DISCRIMINATORY ACTIONS OF THE STATES AND TO HOLD THE STATES ACCOUNTABLE IN FEDERAL COURT FOR ACTS OF DISCRIMINATION. MOREOVER, EVEN IN THE ABSENCE OF ABROGATION CALIFORNIA HAS WAIVED ITS IMMUNITY AND HAS CONSENTED TO SUIT.	4
A. With Section 504 Congress Enacted Legislation Against A Class That Literally Included The States.	6
1. Pre-enactment history.	6
2. Post-enactment history.	11
B. Utilizing Its Fourteenth Amendment Powers Congress Enacted Section 504 And Directed That Section 504 Be Enforced By Private Parties Against All Recipients Of Federal Financial Assistance Including the States.	14
1. Congress utilized its plenary power under the Fourteenth Amendment when it enacted Section 504.	14
2. Congress intended that Section 504 be enforced by private parties against all recipients of federal assistance including the states.	18
C. Under Existing Case Law The Eleventh Amendment Does Not Bar This Suit.	24

Table of Contents Continued

	Page
1. Congress has abrogated California's Eleventh Amendment immunity.	24
2. California has waived its Eleventh Amendment immunity.	29
3. California has consented to suit.	31
II. HANS V. LOUISIAN SHOULD BE OVERRULED. ITS EXTENSION OF THE ELEVENTH AMENDMENT TO BAR FEDERAL QUESTION CASES IS CONTRARY TO THE ELEVENTH AMENDMENT'S ORIGINAL MEANING.	33
A. The Adoption Of Article III.	34
B. The Adoption Of The Eleventh Amendment.	41
C. Early Interpretation Of The Eleventh Amendment.	45
CONCLUSION	49
APPENDIX A: Additional Constitutional Provisions ...	1a
APPENDIX B: Recent Scholarship Regarding State Immunity Under Article III And The Eleventh Amendment	3a

TABLE OF AUTHORITIES

CASES:	Page
<i>Adkicks v. S. H. Kress & Co.</i> , 398 U.S. 144 (1970) ..	17
<i>Alabama v. Pugh</i> , 438 U.S. 781 (1978)	30
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) ..	26
<i>Alexander v. Choate</i> , 105 S.Ct. 712 (1985)	<i>passim</i>
<i>Allen v. State Bd. of Elections</i> , 393 U.S. 544 (1969) ..	18
<i>Ames v. Kansas</i> , 111 U.S. 449 (1884)	46
<i>Beers v. Arkansas</i> , 61 U.S. (20 How.) 527 (1858)	31
<i>Bell v. Hood</i> , 327 U.S. 678 (1946)	28
<i>Bivens v. Six Unknown Federal Narcotics Agents</i> , 403 U.S. 388 (1971)	28
<i>Board of Education of the Hendrick Hudson Central School District v. Rowley</i> , 458 U.S. 176 (1982) ...	7
<i>Bob Jones University v. IRS</i> , 461 U.S. 574 (1983) ...	9-10
<i>Brookhart v. Illinois State Board of Education</i> , 697 F.2d 179 (7th Cir. 1983)	48
<i>Brown v. Pitchess</i> , 13 Cal.3d 518, 119 Cal.Rptr. 204, 531 P.2d 772 (1975)	24
<i>Burt v. Abel</i> , 585 F.2d 613 (4th Cir. 1978)	26
<i>Camenisch v. University of Texas</i> , 616 F.2d 127 (5th Cir. 1980), <i>vacated on other grounds</i> , 451 U.S. 390 (1981)	19
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979)	<i>passim</i>
<i>Cherokee Nation v. The State of Georgia</i> , 30 U.S. (5 Pet.9) (1831)	47
<i>Chisolm v. Georgia</i> , 2 Dall. 419 (1793)	<i>passim</i>
<i>Cohens v. Virginia</i> , 19 U.S. (6 Wheat.) 264 (1821) 45, 46, 47	
<i>Consolidated Rail Corp. v. Darrone</i> , 104 S.Ct. 1248 (1984)	<i>passim</i>
<i>Coop v. South Bend</i> , 635 F.2d 652 (7th Cir. 1980)	26
<i>Davis v. Bucher</i> , 451 F.Supp. 791 (E.D. Pa. 1978) ...	21
<i>Davis v. Gray</i> , 83 U.S. (16 Wall.) 203 (1873)	47
<i>Davis v. Passman</i> , 442 U.S. 228 (1979)	28

Table of Authorities Continued

	Page
<i>Davis v. Southeastern Community College</i> , 574 F.2d 1158 (4th Cir. 1978), <i>rev'd sub nom Southeast Community College v. Davis</i> , 442 U.S. 397 (1979) ..	19, 21
<i>Dopico v. Goldschmidt</i> , 687 F.2d 644 (2d Cir. 1982) ..	28
<i>Drennon v. Philadelphia General Hospital</i> , 428 F.Supp. 809 (E.D. Pa. 1977)	21
<i>Duran v. City of Tampa</i> , 430 F.Supp. 75 (M.D. Fla. 1977), 451 F.Supp. 954 (M.D. Fla. 1978)	21
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974)	<i>passim</i>
<i>EEOC v. Wyoming</i> , 460 U.S. 226 (1983)	16, 17
<i>Employees v. Missouri Public Health Dept.</i> , 411 U.S. 279 (1973)	24, 25
<i>Ex Parte Madrazo</i> , 32 U.S. (7 Pet.) 627 (1833)	46
<i>Ex Parte New York</i> , 256 U.S. 490 (1921)	47
<i>Ex Parte Virginia</i> , 100 U.S. 339 (1880)	17, 25, 28
<i>Ex Parte Young</i> , 209 U.S. 123 (1908)	23, 24
<i>Ferris v. University of Texas</i> , 558 F.Supp. 536 (W.D. Tex. 1983)	48
<i>Fitzpatrick v. Bitzer</i> , 427 U.S. 445 (1976)	3, 4, 17, 25
<i>Florida Dept. of Health v. Florida Nursing Home Ass'n.</i> , 400 U.S. 147 (1981)	3, 24, 30
<i>Ford Motor Co. v. Dept. of Treasury of Indiana</i> , 323 U.S. 459 (1945)	27, 32
<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1980)	16, 17, 32
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , No. 82-1913 (February 19, 1985)	4, 34, 48
<i>Georgia NAACP v. Georgia</i> , 570 F.Supp. 314 (S.D. Ga. 1983)	48
<i>Governor of Georgia v. Madrazo (Madrazo I)</i> , 26 U.S. (1 Pet.) 110 (1828)	46
<i>Great Northern Life Ins. Co. v. Read</i> , 322 U.S. 47 (1944)	30
<i>Green v. California</i> , 73 Cal.2d 29 (1887)	30
<i>Guardian's Ass'n. v. Civil Service Comm.</i> , 103 S.Ct. 3221 (1983)	8, 9, 19, 26

Table of Authorities Continued

	Page
<i>Hall v. University of Nevada</i> , 8 Cal.3d 522, 105 Cal. Rptr. 355, 503 P.2d 1363 (1972), <i>cert. denied</i> , 414 U.S. 820 (1973)	32
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890)	<i>passim</i>
<i>Harland v. State of California</i> , 99 Cal.App.3d 839, 160 Cal. Rptr. 613 (1979)	30
<i>Hawaii Housing Authority v. Midkiff</i> , 81 L.Ed.2d 186 (1984)	33
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978)	3, 4, 25, 26
<i>Johnson v. Railway Express Agency</i> , 421 U.S. 454 (1975)	26
<i>Kampmeier v. Nyquist</i> , 553 F.2d 296 (2d Cir. 1977)	19, 21
<i>Katzenbach v. Morgan</i> , 384 U.S. 641 (1966)	10, 16, 18
<i>Kling v. County of Los Angeles</i> , 633 F.2d 876 (9th Cir. 1980)	18
<i>Kruse v. Campbell</i> , 431 F.Supp. 180 (E.D. Va. 1977), <i>vacated and remanded for consideration under Sec. 504</i> , 434 U.S. 808 (1977)	18, 19
<i>Lau v. Nichols</i> , 414 U.S. 563 (1974)	31
<i>Leary v. Crapsey</i> , 566 F.2d 863 (2d Cir. 1977)	21
<i>Lloyd v. Regional Transp. Authority</i> , 548 F.2d 1277 (7th Cir. 1977)	19, 21, 28
<i>Maurice v. State of California</i> , 43 Cal.App.2d 270 (1941)	32
<i>Miener v. State of Missouri</i> , 673 F.2d 969 (8th Cir. 1982)	18
<i>Mills v. Board of Education</i> , 348 F.Supp. 866 (D.D.C. 1972)	7
<i>Minnesota State Board for Community Colleges v. Knight</i> , 79 L.Ed.2d 299 (1984)	33
<i>Miree v. DeKalb County</i> , 433 U.S. 25 (1977)	17
<i>Mississippi University for Women v. Hogan</i> , 458 U.S. 718 (1982)	33
<i>Mitchum v. Foster</i> , 407 U.S. 225 (1972)	5, 28
<i>Monaco v. Mississippi</i> , 292 U.S. 313 (1934)	47
<i>Monell v. New York City Department of Social Services</i> , 436 U.S. 658 (1978)	33

Table of Authorities Continued

	Page
<i>Morlock v. Ohio</i> , 563 F.Supp. 15 (D.Ohio 1982)	48
<i>Murray v. Wilson Distilling Co.</i> , 213 U.S. 151 (1909) .	31
<i>Muskopf v. Corning Hospital Dist.</i> , 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961)	29, 30
<i>N.A.A.C.P. v. Wilmington Medical Center, Inc.</i> , 599 F.2d 1247 (3rd Cir. 1979)	19
<i>NCAA v. Board of Regents of University of Oklahoma</i> , 82 L.Ed.2d 70 (1984)	33
<i>Nevada v. Hall</i> , 440 U.S. 410 (1979)	35
<i>New Motor Vehicle Board v. Orrin W. Fox Co.</i> , 439 U.S. 96 (1978)	33
<i>New Mexico v. Mescalero Apache Tribe</i> , 76 L.Ed.2d 611 (1983)	34
<i>New Mexico Ass'n for Retarded Citizens v. New Mexico</i> , 678 F.2d 847 (10th Cir 1982)	48
<i>North Haven Board of Education v. Bell</i> , 456 U.S. 512 (1982)	5
<i>Ohio Bureau of Employment Serv. v. Hodony</i> , 431 U.S. 471 (1977)	33
<i>Oklahoma v. Civil Service Commission</i> , 330 U.S. 127 (1957)	31-32
<i>Osborn v. The Bank of The United States</i> , 22 U.S. (9 Wheat.) 739 (1824)	45, 47
<i>Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission</i> , 75 L.Ed.2d 752 (1983)	34
<i>Parden v. Terminal Railway Co. of Alabama State Docks</i> , 377 U.S. 184 (1964)	4, 25, 31
<i>Penn. Assoc. for Retarded Children (PARC) v. Com- monwealth of Penn.</i> , 343 F.Supp. 279 (E.D. Pa. 1972)	7
<i>Pennhurst State School v. Halderman</i> (Pennhurst I), 451 U.S. 1 (1981)	3, 24, 27
<i>Pennhurst State School Hosp. v. Halderman</i> (Pennhurst II), 104 S.Ct. 900 (1984)	30

Table of Authorities Continued

	Page
<i>Perez v. University of Puerto Rico</i> , 600 F.2d 1 (1st Cir. 1979)	26
<i>Perkins v. Lukens Steel Co.</i> , 310 U.S. 113 (1940)	32
<i>Petty v. Tennessee-Missouri Bridge Commission</i> , 359 U.S. 275 (1959)	4, 31
<i>Public Service Commission v. Mid-Louisiana Gas Co.</i> , 77 L.Ed.2d 668 (1983)	34
<i>Pushkin v. Regents of the University of Colorado</i> , 658 F.2d 1372 (10th Cir. 1981)	18, 48
<i>Quern v. Jordan</i> , 440 U.S. 332 (1979)	25, 26
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978)	5
<i>Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority</i> , 718 F.2d 490 (1st Cir. 1983)	48
<i>S-1 v. Turlington</i> , 635 F.2d 342 (5th Cir.) cert. denied, 454 U.S. 838 (1981)	5, 6
<i>Scott v. Kentucky Parole Board</i> , 429 U.S. 60 (1976) ..	33
<i>Sherry v. New York State Education Dept.</i> , 479 F.Supp., 1328 (W.D.N.Y. 1979)	48
<i>Smith v. Reeves</i> , 178 U.S. 436 (1900)	30, 47
<i>Sosna v. Iowa</i> , 419 U.S. 293 (1975)	32
<i>Southeastern Community College v. Davis</i> , 442 U.S. 397 (1979)	19, 33, 48
<i>Strathie v. Pennsylvania Dept. of Transportation</i> , 716 F.2d 227 (3d Cir. 1983)	48
<i>United States v. Bright</i> , 24 Fed. Cas. 1232 (Cir. Ct. 1809)	45, 47
<i>United States v. Price</i> , 383 U.S. 787 (1966)	6
<i>University of Texas v. Camenisch</i> , 451 U.S. 390 (1981)	27, 33, 48
<i>Virginia State Board of Pharmacy v. Virginia Citizens</i> , 425 U.S. 798 (1976)	3
<i>Washington v. Seattle School Dist. No. 1</i> , 458 U.S. 457 (1982)	33

Table of Authorities Continued

	Page
<i>Wyatt v. Stickney</i> , 344 F.Supp. 373, 344 F.Supp. 387 (M.D. Ala. 1972) <i>aff'd sub nom Wyatt v. Aderholt</i> , 503 F.2d 1305 (5th Cir. 1974)	5
<i>Whitaker v. Board of Higher Education</i> , 461 F.Supp. 99 (E.D. N.Y. 1978)	21, 22
U.S. CONSTITUTION:	
Art. I, Sec. 8, Clause 1 [The Spending Clause]	i, 31
Art. III	<i>passim</i>
Art. III, Sec. 2	43
Art. VI, Clause 2 [The Supremacy Clause]	1
Eleventh Amendment	<i>passim</i>
Fourteenth Amendment	<i>passim</i>
Section 5	1, 24
CALIFORNIA CONSTITUTION:	
Article III, § 5	3, 29
Article XX, § 6	29
STATUTES:	
A. State:	
Cal. Gov't Code §§ 800 <i>et seq.</i>	29
Cal. Gov't. Code §§ 12900 <i>et seq.</i>	31
Cal. Gov't. Code § 12965(b)	31
42 Pa. Cons. Stat. § 8521(b) (1980)	30
B. Federal:	
Civil Rights Act of 1871 [42 U.S.C. § 1983]	23
Civil Rights Act of 1964	5
Title VI [42 U.S.C. § 2000d]	<i>passim</i>
Title VII [42 U.S.C. § 2000e <i>et seq.</i>]	28
Civil Rights Attorney's Fees Act of 1976 [42 U.S.C. § 1988]	23
Education Amendments of 1972, Title IX [20 U.S.C. § 1671 <i>et seq.</i>]	<i>passim</i>

Table of Authorities Continued

	Page
Executive Order No. 11914 [41 Fed. Reg. 17871 (1976)]	12
Rehabilitation Act of 1973 [29 U.S.C. §§ 701 <i>et seq.</i>] 4, 6, 17	
Title V [29 U.S.C. §§ 791-794a]	3
Section 501 [29 U.S.C. § 791]	28
Section 504 [29 U.S.C. § 794]	<i>passim</i>
Section 505 [29 U.S.C. §§ 505(a)(2) and (b)]	3, 19, 20, 23, 28
White House Conference on Handicapped Individuals [29 U.S.C. § 701, note]	14
Title III [Pub. L. 93-516, 88 Stat. 1631-34]	14
FEDERAL REGULATIONS:	
29 Fed. Reg. 16274-16305 (1964)	9
37 Fed. Reg. 20,122 (1972)	10
41 Fed. Reg. 17871 (1976) (Exec. Order No. 11914) ...	12
42 Fed. Reg. 22676 (1977)	12, 16
43 Fed. Reg. 2132 (1978)	12
28 C.F.R. § 42.102(f) (1984)	9
28 C.F.R. § 41.3(d)	9
29 C.F.R. § 31.2(h)	9
34 C.F.R. § 106.2(h)	10
45 C.F.R. § 84.3(f)	12
45 C.F.R. § 84.6	26
LEGISLATIVE MATERIAL:	
110 Cong. Rec. 1527 (1964)	17
110 Cong. Rec. 1542 (1964)	9
110 Cong. Rec. 6544 (1964)	17
110 Cong. Rec. 10075-10076 (1964)	9
110 Cong. Rec. 13700 (1964)	9
117 Cong. Rec. 42293-42294 (1971)	14
117 Cong. Rec. 45974 (1971)	7, 15
117 Cong. Rec. 45974-45975 (1971)	7, 16

Table of Authorities Continued

	Page
118 Cong. Rec. 525 (1972)	8, 15
118 Cong. Rec. 526 (1972)	16
118 Cong. Rec. 1368 (1972)	14
118 Cong. Rec. 1595 (1972)	7, 15, 16
118 Cong. Rec. 2999 (1972)	8, 15
118 Cong. Rec. 3320-3322 (1972)	14
118 Cong. Rec. 3322 (1972)	16
118 Cong. Rec. 4341 (1972)	8
118 Cong. Rec. 4342 (1972)	15
118 Cong. Rec. 8975 (1972)	5, 16
118 Cong. Rec. 8975-8976 (1972)	5
118 Cong. Rec. 9495 (1972)	8, 15, 16
118 Cong. Rec. 9501 (1972)	8, 16
118 Cong. Rec. 11789-11790 (1972)	15, 16
118 Cong. Rec. 30681 (1972)	11, 15
118 Cong. Rec. 32310 (1972)	11, 15
118 Cong. Rec. 35840-35841 (1972)	5, 16
118 Cong. Rec. 37203-37204 (1972)	10
119 Cong. Rec. 7105 (1973)	5
119 Cong. Rec. 9597 (1973)	10
119 Cong. Rec. 18137 (1973)	11, 15
119 Cong. Rec. 24562 (1973)	16
119 Cong. Rec. 24586-24587 (1973)	11
119 Cong. Rec. 24587 (1973)	5, 15, 16
119 Cong. Rec. 24589 (1973)	5, 16
120 Cong. Rec. 15743-15744 (1974)	13, 21
122 Cong. Rec. 3257 (1976)	15
123 Cong. Rec. 17,546-17,547 (1977)	13
124 Cong. Rec. 13899 (1978)	16
124 Cong. Rec. 13901 (1978)	14
124 Cong. Rec. 30326 (1978)	15

Table of Contents Continued

	Page
124 Cong. Rec. 30328 (1978)	15
124 Cong. Rec. 30346 (1978)	15
124 Cong. Rec. 30346-30347 (1978)	20
124 Cong. Rec. 30347 (1978)	16
124 Cong. Rec. 30349 (1978)	20, 21
124 Cong. Rec. 30576-30579 (1978)	22, 23
124 Cong. Rec. 37507-37508 (1978)	16, 20
124 Cong. Rec. 38551 (1978)	13, 14
124 Cong. Rec. 38552 (1978)	14
H.R. 8862, 95th Cong. 1st Sess. (1977)	21
H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. (1978) .	20, 22
S. Rep. No. 93-319, 93rd Cong., 2nd Sess. (1974)	14
S. Rep. No. 93-1297, 93rd Cong., 2nd Sess. (1974)	5, 11, 14, 15, 20
S. Rep. No. 95-890, 95th Cong., 2nd Sess. (1978)	20, 22, 23
S. Rep. No. 96-316, 96th Cong., 1st Sess. (1979)	22, 26

MISCELLANEOUS:

<i>A. Public Laws and U.S. Code Cong. & Admin. News</i>	
Pub. L. No. 93-516, 88 Stat. 1617	11
1964 U.S. Code Cong. & Admin. News at 2394	9
1964 U.S. Code Cong. & Admin. News at 2469-2470, 2512-2513	9

B. Hearings

<i>Implementation of Section 504, Rehabilitation Act of 1973. Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977)</i>	<i>passim</i>
--	---------------

<i>Oversight Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies under the Rehabilitation Act of 1973, before the Senate Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 94th Cong., 2d. Sess. (1976)</i>	<i>21, 23</i>
---	---------------

Table of Authorities Continued

	Page
<i>C. Law Review Articles</i>	
<i>Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act</i> , 55 N.Y.U. L. Rev. 881 (1980)	13
Borchard, <i>Government Liability in Tort</i> , 34 Yale L. J. 1 (1924)	34
Burgdorf and Burgdorf, <i>A History of Unequal Treatment: the Qualifications of Handicapped Persons as a Suspect Class Under the Equal Protection Clause</i> , 15 Santa Clara Lawyer 855 (1975)	14
Cook, <i>Nondiscrimination in Employment Under the Rehabilitation Act of 1973</i> , 27 Am. U.L. Rev. 31 (1977)	14
Gibbons, <i>The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation</i> , 83 Col. L. Rev. 1890 (1983)	34, 38, 44
Jaffee, <i>Suits Against Governments and Officers: Sovereign Immunity</i> , 77 Harv. L. Rev. 1 (1963) ..	34
Mathis, <i>The Eleventh Amendment: Adoption and Interpretation</i> , 2 Ga. L. Rev. 207 (1968)	34, 44
Note, <i>Torts: Sovereign Immunity: Scope of Doctrine Severely Limited in California</i> 49 Calif. L. Rev. 400 (1961)	29
Nowak, <i>The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments</i> , 75 Col. L. Rev. 1413 (1976)	42, 44
Orth, <i>The Intrepreation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power</i> , U.Ill. L.F. 423 (1983)	46
Wegner, <i>The Antidiscrimination Model Reconsidered: Insuring Equal Opportunity without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973</i> , 69 Corn. L. Rev. 401 (1984)	16
<i>D. Treatises</i>	
Blackstone, W., <i>Commentaries on the Laws of England</i> , I, Elliot, J., Ed., <i>The Debates in the Several State Conventions of the Adoption of the Federal Constitution</i> , v. 2 & 3 (1866)	34

Table of Authorities Continued

	Page
Ford, P., <i>Pamphlets on the Constitution of the United States</i> , (1888)	35
Friedman, L. & F. Israel, Eds., <i>The Justices of the United States Supreme Court 1789-1969</i> , v. 1 (1969)	41, 45
Jacobs, C., <i>The Eleventh Amendment and Sovereign Immunity</i> , (1972)	34, 44
Larson, <i>Federal Court Awards of Attorney's Fees</i> , (1981)	26
Office of the Assistant Secretary for Management and Budget, U.S. Dept. of Health and Human Services, "Financial Assistance by Geographia Area, Fiscal Year 1983, Region IX," DHHS Publications No. (65) 83-12.	2
<i>The Complete Anti-Federalist</i> , (H. Stoering Ed. 1981)	37
<i>The Debates in the Several State Conventions of the Adoption of the Federal Constitution</i> (J. Elliot, Ed. 1866)	36, 38, 40,
<i>The Federalist Papers</i> , (Mentor Ed., 1962)	39
U.S. Dept. of State, <i>Documentary History of the Constitution</i> , v. ii (1984)	41, 43
Warren, C., <i>The Supreme Court in United States History</i> , (1922)	43

ADDITIONAL CONSTITUTIONAL PROVISIONS

Included as Appendix A are the following provisions of the United States Constitution: (1) the Spending Clause—Article I, Section 8, Clause 1; (2) Article III, Section 2; (3) the Supremacy Clause—Article VI, Clause 2; (4) Sections 1 and 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

Respondent Douglas James Scanlon adopts the statement of the case set forth in the Ninth Circuit opinion reported at 735 F.2d 359, and adopts his Statement of the Case at pp. 2-4 in Respondent's Brief in Opposition to the Petition for Writ of Certiorari. To those statements he adds the following:

First, although petitioners (California) now dispute that Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, was enacted pursuant to Section 5 of the Fourteenth Amendment, Pet. Br. at 67-71, below they conceded that Section 504 was enacted pursuant to Congress' power under Section 5 of the Fourteenth Amendment:

"The federal Rehabilitation Act of 1973 and the civil rights legislation to which it is coat-tailed were enacted pursuant to the *Fourteenth Amendment*, not the Commerce Clause, or the War Powers Clause, or the like." (C.R. 12-3).¹ (Emphasis in original.)

Second, although the United States Department of Health, Education, and Welfare (HEW)—predecessor to the United States Department Health and Human Services (HHS)—found California to be in violation of Section 504 in May, 1979, to date no enforcement action has been taken by either HEW or HHS.

Third, the job from which respondent was excluded was a part-time, 9-month student internship position. J.A. at 9, ¶ 8.

¹ Citation is to designated certified record in Court of Appeal, by docket control number and page. Thus C.R. 12-3 represents docket control number 12 at page 3. Citations to Joint Appendix will appear as "J.A. at ____."

Fourth, respondent is a citizen and resident of the State of California. J.A. at 5.

Fifth, while the record does not indicate the amount of federal financial assistance going to California, public records indicate that for fiscal year 1983, California received a total of \$28,684,822,392 in federal assistance from HHS alone.²

Sixth, the amicus brief of the Solicitor General in support of California constitutes a dramatic reversal of the Department of Justice's position on whether suits can be brought against the state under Section 504. The Department of Justice filed a brief *amicus curiae* in the Ninth Circuit of Appeals in support of respondent Scanlon.³

SUMMARY OF ARGUMENT

In enacting and amending Section 504 Congress has abrogated any Eleventh Amendment immunity California may have. Section 504 is part of the "civil rights enforcement scheme" that successive Congresses have created over the past 110 years." Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 686 n. 7 (1979). Section 504 was enacted pursuant to the Spending Clause and, as petitioners concede, the Fourteenth Amendment. The legislative history makes clear that states and local governmental entities were the primary targets in the enactment of Section 504.

Section 504 was considered and enacted in 1972 and 1973 against a backdrop of eight years of private and public enforcement of Titles VI and IX, whose language it tracks. (Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1671 *et seq.*) Section 504, like Title VI and Title IX, imposes nondiscrimina-

² Office of the Assistant Secretary for Management and Budget, U.S. Dept. of Health and Human Services, "Financial Assistance by Geographic Area, Fiscal Year 1983, Region IX," DHHS Publications No. (65) 83-12.

³ Citations to the Justice Department's brief in the Ninth Circuit will appear as "Ninth Circuit Br. of U.S. at ____." Citations to the Department's brief in this Court will appear as "Br. of U.S. at ____."

tion obligations on all recipients of federal financial assistance. A review of legislative history, regulations and litigation indicates that in enacting Section 504 Congress defined a class subject to suit which literally included states within the meaning of *Edelman v. Jordan*, 415 U.S. 651, 672 (1974).

Congress' intention to subject states to Section 504 obligations and to suit by private litigants in federal court was underscored by the 1978 amendments to Title V of the Rehabilitation Act, 29 U.S.C. §§ 791-794a.: the amendment extended Section 504's nondiscrimination obligations to the federal government itself and with the addition of Section 505, 29 U.S.C. § 794a, expressly extended Title VI remedies, procedures, and rights to Section 504 (§ 505(a)(2), 29 U.S.C. § 794a(a)(2)), and permitted an award of attorney's fees to a prevailing party. Certainly Congress did not waive federal immunity only to preserve the states' immunity. Ninth Circuit Br. of U.S. at 40.

Section 504 by imposing substantive requirements on states is thus distinguishable from acts which merely declare policy, *Pennhurst State School v. Halderman* (*Pennhurst I*), 451 U.S. 1, 19 (1981), or are merely cooperative state-federal programs. *Edelman v. Jordan*, *supra*; *Florida Dept. of Health v. Florida Nursing Home Ass'n.*, 450 U.S. 147 (1981). The Eleventh Amendment is no bar particularly where Congress has acted pursuant to its powers under the Fourteenth Amendment and deliberately has included the states within the class of defendants subject to federal court suit. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Hutto v. Finney*, 437 U.S. 678, 693-698 (1978).

California by Article 3, § 5 of its Constitution has waived any immunity except as affirmatively imposed by its legislature. The legislature has imposed no immunity to federal suit. Additionally, under federal and California law California has consented to suit.

Finally, as it discussed fully in Section II, *infra*, the legislative history of Article III and the Eleventh Amendment demonstrates no intent to immunize the states from suits com-

menced in federal court by their own citizens so as to override the actual language of the Amendment itself.⁴ Accordingly, *Hans v. Louisiana*, 134 U.S. 1 (1980) and *Edelman v. Jordan*, *supra*, to the extent it relies on *Hans*, should be overruled. The rules they create are unsound in principle and unworkable in practice. Cf. *Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913 (February 19, 1985).

ARGUMENT

I. IN ENACTING SECTION 504 CONGRESS HAS ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES. SECTION 504 IS A BROADLY REMEDIAL STATUTE THAT WAS ENACTED TO HALT HANDICAP DISCRIMINATION. CONGRESS EXPRESSLY INTENDED TO LIMIT THE DISCRIMINATORY ACTIONS OF THE STATES AND TO HOLD THE STATES ACCOUNTABLE IN FEDERAL COURT FOR ACTS OF DISCRIMINATION. MOREOVER, EVEN IN THE ABSENCE OF ABROGATION CALIFORNIA HAS WAIVED ITS IMMUNITY AND HAS CONSENTED TO SUIT.

All parties and amici agree that under current case law the Eleventh Amendment immunity of the state is not absolute. Congress can abrogate the immunity. *Fitzpatrick v. Bitzer*, *supra*; *Hutto v. Finney*, *supra*. The state can waive the immunity and consent to suit. *Parden v. Terminal Railway Co.*, 377 U.S. 184 (1964); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). Abrogation, waiver and consent are all present in this litigation.

⁴ For instance, the Madison-Marshall-Hamilton statements relied upon in *Hans* were not made until *after* nine states had ratified the constitution thereby putting the constitution into effect under Article VII. The opponents and proponents of ratification prior to that time agreed that states were amenable to suit in federal court by citizens of their own state and other states. In addition, two proposed versions of the Eleventh Amendment were introduced in the House of Representatives. The version rejected was the version which by its terms would have barred suit against a state by its own citizens.

With the passage of Section 504 of the Rehabilitation Act of 1973, this country turned a new corner in its history. As with the Fourteenth Amendment and the Civil Rights Acts of the Reconstruction Era, with Section 504 a "new structure of law" emerged. *Cf.*, *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). Section 504 was aimed at "improving the lot of the handicapped," *Consolidated Rail Corp. v. Darrone*, 104 S.Ct. 1248, 1250 (1984)(*Darrone*), through the eradication of government sponsored or condoned discrimination.

"Section 504 was enacted to prevent discrimination against all handicapped individuals . . . in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs."

S. Rep. No. 93-1297 at 38. (1974).

"Simply stated, the goal of this new law is to help handicapped individuals to achieve their full potential of participation within our society."

118 Cong.Rec. 35, 841 (1972) (remarks of Senator Stafford).⁵

Section 504 creates personal rights which Congress intends to be privately enforced. *Cf.*, *Regents of the University of California v. Bakke*, 438 U.S. 265, 419-20 nn. 26-28 (1978) (Stevens, J.) (*Bakke*) (interpreting Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*); *Cannon v. University of Chicago*, 441 U.S. 677, 689-709 (1979) (*Cannon*) (interpreting Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1671 *et seq.*). The language of Section 504, like that of Title VI whose words Section 504 tracks, "is majestic in its sweep," *Bakke, supra*, 438 U.S. at 284 (Powell, J.), and must be accorded "a sweep as broad as its language." *Cf.*, *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 521 (1982), *quoting*

⁵ See also, 119 Cong.Rec. 24, 589-24, 590 (1973). (Remarks of Sen. Dole); 119 Cong. Rec. 24, 587 (1973) (remarks of Sen. Taft); 118 Cong. Rec. 8975 (1972) (remarks of Rep. Brademas); 118 Cong. Rec. 8976 (1972) (remarks of Rep. Perkins); (Section 504 was intended to be "a bill of rights for the handicapped.") 119 Cong. Rec. 7105 (1973) (remarks of Rep. Peyser).

United States v. Price, 383 U.S. 787, 801 (1966); see also, *S-1 v. Turlington*, 635 F.2d 342, 347 (5th Cir.), *cert. denied*, 454 U.S. 838 (1981).

Contrary to the new position of the United States, Br. of U.S. at 23, "language as broad as that of § 504 cannot be read in isolation from its history and purposes." *Darrone, supra*, 104 S.Ct. at 1254 n. 13. This history and purpose confirm that the Eleventh Amendment has no application to Section 504.⁶

A. With Section 504 Congress enacted legislation against a class that literally included the states.

1. Pre-enactment history.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, provides, in relevant part:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . ."

As is plain, the statute applies to *any* recipient of federal financial assistance. However, in considering Section 504 and its predecessors, Congress paid particular attention to discriminatory action by the states and other units of government.

The origins of Section 504 lay in proposals to amend Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.⁷ *Alexander v. Choate*, 105 S.Ct. 712, 718 n.13 (1985). These early proposals are the "primary sign post[s], on the road toward interpreting

⁶ *Accord*, "the Congressional intent to make states amenable to suit under Section 504 can be gleaned from the framework of the statute, its legislative history and statutory purpose." Ninth Circuit Br. of U.S. at 32.

⁷ Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

the legislative history of § 504" *Id.* In introducing the Title VI predecessor to Section 504, Rep. Vanik stated:

"Our Governments tax [handicapped] people, their parents and relatives, but fail to provide services for them. . . . The opportunities provided by the Government almost always exclude the handicapped."

117 Cong. Rec. 45,974 (1971). Rep. Vanik saw in emerging court decisions the need for this measure. Rep. Vanik focused on *Penn. Assoc. for Retarded Children (PARC) v. Commonwealth of Penn.*, 343 F.Supp. 279 (E.D.Pa. 1972),⁸ which he described as a "suit against the State," 117 Cong. Rec. 45,974-45,975 (1971), to highlight the inadequacies of State programs for handicapped persons. *See also*, 118 Cong. Rec. 1595 (1972), where Rep. Vanik again referring to the *PARC v. Pennsylvania* decision stated, "In most States, many mentally retarded children have also been denied their rights to an education. . . . As long as this horrible exclusion exists in most of the states in our land, you can exclude any children you desire."

Barely two months after introducing his bill, Rep. Vanik again noted:

"While parents seek medical care for their children, *State* and local governments lack funds and facilities. Handicapped children of low-income families seek tuition funding, but *State* and local governments favor the higher income families. . . .

The handicapped child is excluded from schools because the *States* are either unable to define and deal with his illness, or care is so shoddy that the problems are multiplied. . . .

Exclusion of handicapped children is illegal in some *States*, but the *States* plead lack of funds. . . . Statistics

⁸ This Court has recognized the importance of the *PARC* decision as a key impetus to Congressional protection of handicapped rights. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 192-196 (1982). *See also*, *Mills v. Bd. of Education*, 348 F.Supp. 866 (D.D.C. 1972), for another court decision that greatly affected the congressional debate on the rights of handicapped persons.

concerning *State* care of the handicapped child are shocking. They range from the *California* rate of providing service for 54 percent of the handicapped children in the State, to *Vermont's* rate of approximately 22 percent. . . .

118 Cong. Rec. 4341 (1972) (emphasis added). *See also*, 118 Cong. Rec. 2999 (1972) (remarks of Rep. Vanik) ("the average American discriminates by his attitude against the disabled veteran. The *State* governments discriminate by their apathy. . . .") (emphasis added).

Senator Humphrey, Rep. Vanik's Senate counterpart, likewise focused almost exclusively on the failures of government at all levels "to insure equal opportunities" when he introduced the bill in the Senate. 118 Cong. Rec. 525 (1972). Senator Humphrey paid particular attention to a suit against a state operated institution for mentally retarded persons⁹ as demonstrating the need for the bill. 118 Cong. Rec. 9495, 9501 (1972).

By the time the Humphrey-Vanik bill joined the Rehabilitation Act and became Section 504, *see, Alexander v. Choate, supra*, 105 U.S. at 718 nn.13-14, not only had the principal authors publicly focused on the discrimination faced by handicapped persons in state-operated programs and activities, but a substantial history had developed around the use of the term "receiving federal financial assistance" as currently used in the section. The history of the phrase "receiving federal financial assistance" in Titles VI and IX¹⁰ confirms that Section 504 was expressly intended to reach the activities of the states.

Soon after Title VI was enacted seven agencies, assisted by the Justice Department, prepared regulations to implement the act. *Guardian Ass'n. v. Civil Service Comm.*, 103 S.Ct. 3221, 3227 n.13 (White, J.) (1983). Uniformly these regulations

⁹ While Senator Humphrey did not indicate the name of the case he was referring to, from the context it appears to have been *Wyatt v. Stickney*, 344 F.Supp. 373, 344 F.Supp. 387 (M.D. Ala 1972), *aff'd sub nom Wyatt v. Aderholt*, 403 F.2d 1305 (5th Cir. 1974), a suit against Alabama's Partlow State Hospital.

¹⁰ The operative language of Title IX clearly resembles that used in Section 504 and in Title VI. *See*, 20 U.S.C. § 1681(a).

defined a recipient of federal financial assistance as including states and state agencies. See 29 Fed. Reg. 16274-16305 (1964).¹¹

Obviously by attempting to include within Title VI a ban on handicap discrimination eight years after these regulations were issued, Senator Humphrey and Rep. Vanik and the rest of Congress knew that the ban applied to states and state agencies.¹² Congress is presumed to know the law particularly in an area in which it has reviewed closely. *Bob Jones Universi-*

¹¹ In these regulations a recipient was defined as:

"any State, political subdivision of any State or instrumentality of any State or political subdivision, . . ."

See e.g., 29 Fed. Reg. 16274, § 15.2(e) (Dept. of Agriculture).

In short order these seven agencies were joined by every Cabinet department and about 40 federal agencies all of whom defined a recipient of federal financial assistance as including a state or state agency. *Guardians Association, supra*, 103 S.Ct. at 3227 n.13 (White, J.).

See e.g., Dept. of Justice, 28 C.F.R. § 42.102(f) (1984); See also, 29 Fed.Reg. 16274-16305 (1964).

¹² As passed by Congress Title VI did not define "recipient of federal financial assistance." Consequently, it was left to administrative regulations to define this term. As the United States noted in the court below, Ninth Circuit Br. of U.S. at 34 n.32, Title VI was principally geared to affect the states and other units of government.

In discussing the proposed judicial review mechanism in Title VI, Senator Javits stated that "[w]e are primarily trying to reach units of government, not individuals. In the majority of cases, they will be the defendants under Title VI." 110 Cong. Rec. 13700 (1964); see also, *id* at 1542 (1964) (remarks of Rep. Lindsay); *Id* at 10075-10076 (1964). The General Statement of Purpose is that the Civil Rights Act of 1964 will "open additional avenues to deal with redress of denials of equal protection of the laws on account of race, color, religion, or national origin by State or local authorities." 1964 U.S. Code Cong. & Admin. News at 2394. See also 1964 U.S. Code Cong. & Admin. News at 2469-2470, 2512-2513.

ty v. IRS, 461 U.S. 574, 600-01 (1983); *Cannon, supra*, 441 U.S. at 696-700.

As in Title VI, when Title IX was enacted in 1972 Congress did not define the term "recipient." However, this time Congress was not writing on a blank slate. *Cannon, supra*, 441 U.S. at 694-95. Indeed the regulations that govern Title IX define recipient under Title IX in the same words as do the regulations of Title VI.¹³

Clearly by the time that Section 504 was drafted Congress knew the meaning of "recipient of federal financial assistance" as used in federal civil rights laws.¹⁴ In this regard, given the clear Title VI and IX foundation of Section 504, the definition of recipient in Title VI regulations as including a state, and the repeated references by the sponsors of Section 504 to the discriminatory actions of states, it is not surprising that no member of Congress questioned whether Section 504 applied to the states.

If Congress had wanted to limit the applicability of Section 504 it had ample opportunity to do so. Before Section 504 was enacted into law in 1973, the Rehabilitation Act of which it was part was twice vetoed by President Nixon. *See* 118 Cong. Rec. 37203-37204 (1972); 119 Cong. Rec. 9597 (1973). Consequently, Congress had three occasions to consider Section 504 in the span of less than 2 years. In none of these debates did anyone

¹³ Under Title IX "recipient"

"means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, . . ."

34 C.F.R. § 106.2(h). Compare note 11, *supra*. *See also* 37 Fed. Reg. 20,122 (1972).

¹⁴ Legislation should be viewed in the context of its "cultural milieu." *Katzenbach v. Morgan*, 384 U.S. 641, 654, and n.14 (1966); accord *Cannon, supra*, 441 U.S. at 698-699 ("evaluation of congressional action . . . must take into account its contemporary legal context.")

seek to limit the reach of Section 504. To the contrary, the section was lauded for its scope. Congress was told that Section 504 would "prohibit[] *any kind* of discrimination against handicapped individuals with respect to *any* program receiving Federal financial assistance." 118 Cong. Rec. 30681 (1972) (remarks of Senator Randolph) (emphasis added).¹⁵

2. Post enactment history.

The Rehabilitation Act was amended in 1974 by the same Congress that had enacted it a year earlier.¹⁶ The Court has recognized the importance of these amendments to the understanding of Section 504. *Darrone, supra*, 104 S.Ct. at 1254 n.13; *Alexander v. Choate, supra*, 105 S.Ct. at 718-720 & n.7 and 13. The Senate Report that accompanied the amendment stated:

Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, . . . and section 901 of the Education Amendments of 1974 [sic] . . . The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. . . .

The language of section 504, in following the above cited Acts, further envisions the . . . promulgation of regulations. . . .

S. Rep. No. 93-1297, *supra*, at 39-40. If there had been any doubt in 1973 about the link between Section 504 and Titles VI and IX, by 1974 these had been resolved.

¹⁵ See also, 119 Cong. Rec. 18137 (1973) (remarks of Rep. Vanik); 118 Cong. Rec. 32310 (1972) (remarks of Senator Humphrey); 119 Cong. Rec. 24,586-24,587 (1973) (remarks of Senator Randolph, ". . . the antidiscrimination . . . provisions are preserved. These will help expand the vistas of opportunity for handicapped individuals across our land.").

¹⁶ Pub. L. No. 93-516, 88 Stat. 1617. See *Darrone, supra*, 104 S.Ct. at 1253-1254.

In 1977 Congress held hearings on the implementation of Section 504.¹⁷ In the years between 1974 and 1977 Section 504 regulations had been proposed and promulgated by HEW.¹⁸ These regulations defined recipient of federal financial assistance as including the States in the same terms as used in the Titles VI and IX regulations:

45 C.F.R. § 84.3(f).

'Recipient' means any state or its political subdivision, any instrumentality of a state or its political subdivision. . . .¹⁹

These regulations were warmly received by Congress, *see, e.g., 1977 Section 504 Implementation Hearings, supra*, at 1 (remarks of Rep. Brademas), and were codified into Section 504 when the Rehabilitation Act was amended in 1978. *Dar-rone, supra*, 104 S.Ct. at 1255 n.15. *See also, S. Rep. 95-890, 95th Cong., 2d Sess. at 19 (1978)*. Again, no member of Congress questioned the reach of Section 504 as encompassing the states.

During the *1977 Section 504 Implementation Hearings*, the House received considerable evidence from the states about

¹⁷ *Implementation of Section 504, Rehabilitation Act of 1973. Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) (hereinafter 1977 Section 504 Implementation Hearings)*.

¹⁸ In 1976, the President directed the Secretary of HEW to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of Section 504." Exec. Order No., 11914, 41 Fed.Reg. 17871 (1976). The Secretary promulgated regulations in 1977 to govern its own recipients of federal financial assistance. 42 Fed.Reg. 22676 (1977). One year later it promulgated its coordinating regulations. 43 Fed.Reg. 2132 (1978).

¹⁹ See notes 11 and 13, *supra*, for definitions under Titles VI and IX. All executive departments and agencies that have issued Section 504 regulation have defined recipient to include states. *See, e.g., Dept. of Justice, 28 C.F.R. § 41.3(d)*.

the cost of implementing Section 504. *See, e.g., 1977 Section 504 Implementation Hearings, supra*, at 2, 5-6, 13, 37, 43-44, 78-131. While some members of the House were sympathetic to the impact of the costs imposed upon the states by Section 504, *id.* at 78-79 (remarks of Rep. Jeffords),²⁰ even these members did not believe that implementation of Section 504 should be delayed because it cost state money to meet the section's requirements. 124 Cong. Rec. 38,551 (1978) (Rep. Jeffords). Again this is strong recognition that Congress all along fully intended Section 504 to reach the states. Obviously, too, it is strong indication that the states also realized that they were the intended targets of Section 504 from the start and that expenditure of their own funds would be no bar to Section 504 rights. *See Section C infra.*

Finally, Congress amended Section 504 in 1978 to bring within its terms the federal government.²¹ In describing this amendment Rep. Jeffords linked inclusion of the federal government to prior inclusion of the states:

This amendment removes that exemption [of the federal government] and applies 504 to the Federal Government *as well as State* and local recipients of Federal dollars.

²⁰ *See also*, 123 Cong. Rec. 17,546-17,547 (1977) (Rep. Jeffords); 120 Cong. Rec. 15743-15744 (1974) (remarks of Rep. Biaggi); Note: *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. Rev. 881, 888-893 (1980).

²¹ In 1977 the Justice Department Office of Legal Counsel issued an opinion that the Section did not apply to programs conducted by the federal government. In 1978 Section 504 was amended to bring the federal government expressly within the section's reach. As a result section 504 now states that it applies to "any program or activity conducted by an Executive agency or by the United States Postal Service" in addition to "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794.

124 Cong. Rec. 13,901 (1978) (emphasis added).²²

B. Utilizing Its Fourteenth Amendment Powers Congress Enacted Section 504 And Directed That Section 504 Be Enforced By Private Parties Against All Recipients Of Federal Financial Assistance Including The States.

1. Congress utilized its plenary power under the Fourteenth Amendment when it enacted Section 504.

Just as earlier Civil Rights statutes sought to erase discrimination against women and minorities, Section 504 was enacted to halt a long history of discrimination against disabled persons. *Alexander v. Choate*, *supra*, 105 S.Ct. at 718 n.12, and authorities cited therein.²³ Congress has long been aware of the discrimination faced by disabled persons.²⁴ Throughout

²² See also, 124 Cong. Rec. 38551 (1978) (remarks of Rep. Jeffords, "Somehow it did not seem right to me that the Federal Government should require States and localities to eliminate discrimination wherever it exists and remain exempt themselves.") (emphasis added); *Id.* at 38552 (remarks of Rep. Sarasin, "No one should discriminate against an individual because he or she suffers from a handicap—not private employers, not State and local governments, and most certainly, not the Federal Government.") (emphasis added).

²³ See also, Burgdorf & Burgdorf, *A History of Unequal Treatment: the Qualifications of Handicapped Persons as a Suspect Class Under the Equal Protection Clause*, 15 Santa Clara Lawyer 855 (1975); Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 Am. U. L. Rev. 31 (1977); cf. Cannon, *supra*, 441 U.S. at 677-678 n.7.

²⁴ 118 Cong. Rec. 3320-3322 (1972) (remarks of Senator Williams); S. Rep. No. 93-319, 93rd Cong. 1st Sess. at 2-3; S. Rept. No. 93-1297, *supra*, at 50; 117 Cong. Rec. 42293-42294 (1971); (remarks of Senator Cook regarding Senate Concurrent Res. No. 52); 118 Cong. Rec. 1368 (1972) (remarks of Senator Percy); White House Conference on Handicapped Individuals, Title III of Pub. L. 93-516, 88 Stat. 1631-1634, 29 U.S.C. § 701, note ("The Congress finds that . . . (2) the benefits and fundamental rights of this society are often denied those individuals with mental and physical handicaps.").

its history Section 504 was called alternately a "milestone," 118 Cong. Rec. 30681 (1972) (remarks of Sen. Cranston) and the "baseline civil rights provision for handicapped Americans." 124 Cong. Rec. 30328 (1978) (remarks of Senator Stafford). The section's purpose was to end discrimination in all of its forms. 119 Cong. Rec. 24587 (1973) (remarks of Senator Taft); *see also*, S. Rep. No. 93-1297, *supra* at 38. It "guarantees the civil rights of the handicapped." 122 Cong. Rec. 3257 (1976) (remarks of Rep. Dodd); 124 Cong. Rec. 30346 (1978) (remarks of Senator Cranston); *id* at 30326 (remarks of Senator Dole).

This purpose had been clear from the beginning. In introducing the Title VI predecessor to Section 504 Rep. Vanik stated that the measure "provide[s] equal treatment of the handicapped . . ." and "will insure equal education and employment opportunities." 117 Cong. Rec. 45974 (1971). Barely one month later Rep. Vanik stated that his proposal was an "endeavor to insure the protection of the legal and constitutional rights of our . . . citizens." 118 Cong. Rec. 1595 (1972); *accord* 118 Cong. Rec. 2999 (1972); *id* at 4342; 119 Cong. Rec. 18137 (1973).

Senator Humphrey's remarks echoed Rep. Vanik's.

"I introduce . . . a bill to insure equal opportunities for the handicapped . . .

"I am insisting that the civil rights of 40 million Americans now be affirmed and effectively guaranteed by Congress. . . ."

118 Cong. Rec. 525 (1972). Less than 2 months later Senator Humphrey stated:

"This bill responded to an awakening public interest in millions of handicapped children, youth and adults. . . . It is essential that the right of these forgotten Americans to equal protection under laws be effectively enforced. . . .

118 Cong. Rec. 9495; *accord*, *id* at 11789-11790, *id.* at 32310. Senator Humphrey's co-sponsor, Senator Percy, was equally emphatic:

"The amendment we are introducing today would realize this commitment [ending discrimination], [by] guarantee-

ing the handicapped equal opportunity . . . [and] due process of law. . . ."

118 Cong. Rec. 526 (1972); *accord*, *id* at 11789.

In addition both Rep. Vanik and Senator Humphrey relied on federal court decisions against states that raised due process and equal protection challenges to the treatment of handicapped persons as strong evidence both of the necessity for the legislation and of the equal rights that this bill would secure for handicapped individuals. *See* 117 Cong. Rec. 45,974-45,975 (1971); 118 Cong. Rec. 1595 (1972); *id* at 9495, 9501; notes 8 and 9, *supra*, and accompanying text.²⁵

Finally, in amending the law in 1978 and adding Section 505, both principal sponsors of the amendment noted that Congress had the power to enforce Section 504 "under among other things, section 5 of the 14th amendment." 124 Cong. Rec. 30347 (1978) (remarks of Senator Cranston); *id* at 37508 (remarks of Senator Stafford).

All of these remarks are the embodiment of a conscious Congressional effort to extend the protections of the Fourteenth Amendment to handicapped persons. *Katzenback v. Morgan*, 384 U.S. 641-648, 650 (1966); *Fullilove v. Klutznick*, 448 U.S. 448, 476-480 (1980); *see also*, *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983); *see also*, Wegner, *The Antidiscrimination Model Reconsidered: Insuring Equal Opportunity without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 *Corn. L. Rev.* 401, 425-428 (1984).

²⁵ *See also*, 118 Cong. Rec. 8975 (1972) (remarks of Rep. Brademas); *id* at 3322 (remarks of Senator Williams); *id* at 35840, 35841 (remarks of Senator Randolph); 119 Cong. Rec. 24589 (1973) (remarks of Senator Dole); *id* at 24587 (remarks of Senator Randolph); *id* at 24562 (remarks of Senator Stafford); 124 Cong. Rec. 13899 (1978) (remarks of Rep. Biaggi).

See also the preamble to HEW's regulation, 42 Fed. Reg. 22676 (1977).

This Court should reject California's attempt to ignore this history.²⁶ Significantly, this Court has already rejected that part of California's argument, Pet. Br. at 69-71, that the history and purpose of Title VI is completely transferable to Section 504. While the two laws are similar they are not identical. *Darrone, supra*, 105 S.Ct. at 716-720. Moreover, California's argument that Section 504 is exclusively a "spending clause" enactment, rests on the misrecognition of the history of Section 504. Section 504 springs from a separate history and purpose than the rest of the Rehabilitation Act of 1973. See Section IA *supra*. Section 504 was a conscious congressional effort to extend the protections of the constitution to a historically discriminated against minority. Cf., *Fullilove v. Klutznick*, 448 U.S. 448, 476-478 (1980); *EEOC v. Wyoming*, *supra*, 460 U.S. at 243, n.18; see also, notes 24-26, *supra*.²⁷

²⁶ For the first time on appeal California has argued that Section 504 was not enacted pursuant to Section 5 of the Fourteenth Amendment. Pet. Br. at 67-71. Before the District Court and the Court of Appeal California conceded that Section 504 was Fourteenth Amendment Section 5 legislation. See C.R. 12 at 3. Unlike the United States which at least has acknowledged and has attempted to explain its abrupt, and provocative, about face in this litigation, Br. of United States at 2-3, California has neither acknowledged its change in position nor has it explained the justification for it. It is well settled that this Court will not consider issues which were not raised below and this Court should not deviate from this principle now. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Miree v. DeKalb County*, 433 U.S. 25, 33-34 (1977). The Court should assume, as California conceded and the United States has agreed, Br. of U.S. at 9, n.5, that Section 504 was enacted pursuant to Section 5 of the Fourteenth amendment, and that Congress using the Fourteenth Amendment's affirmative grant of power, which exists as an express limit on the states—*Fitzpatrick v. Bitzer*, 427 U.S. at 445, 456 (1976), *Ex parte Virginia*, 100 U.S. 339, 345 (1880)—created a private cause of action in federal court against the states.

²⁷ Section 504 also differs from Title VI in this regard. In the congressional debates concerning Title VI there was considerable question about whether the bill was necessary in light of Fourteenth Amendment case law. See, e.g., 110 Cong. Rec. 1527 (1964) (memorandum of Rep. Cellar (1964); *id* at 6544 (remarks of Sen. Humphrey).

2. Congress intended that Section 504 be enforced by private parties against all recipients of federal financial assistance including the states.

In *Cannon*, this Court concluded that Congress in 1972 intended to create a cause of action under Title IX in part because Congress understood at that time that Title VI, upon which Title IX was based, created privately enforceable rights. 441 U.S. at 703. The same reasoning applies to Section 504 with even greater force.

Section 504 was enacted the year after Title IX and was based in part upon Titles VI and IX. *Alexander v. Choate*, *supra*, 105 S.Ct. at 719-721, and nn.7 and 13. Obviously if Congress knew in 1972 when enacting Title IX that Title VI could be privately enforced it retained this knowledge in 1973.²⁸ Indeed, although twice vetoed, the provision that ultimately became Section 504 was written initially in 1972, by the same Congress that enacted Title IX.

Cannon catalogues this Court's pre-1972 decisions which recognize implied rights of action under various federal statutes. 441 U.S. at 690 n.13. Consequently, in passing section 504 Congress had every reason to believe that implied rights of action under the section would be judicially recognized even against states. *Cannon*, *supra*, 441 U.S. at 718 (Rehnquist, J., concurring); see, e.g., *Allen v. State Board of Elections*, 393 U.S. 544 (1969).²⁹ Even this Court's 1977 order in *Kruse v.*

Title VI was passed in part to make federal law comply to constitutional norms. *Id.* In enacting Section 504 there was no comparable congressional concern. Section 504 was enacted to extend the protections of the constitution to a previously discriminated against minority.

²⁸ *Katzenbach v. Morgan*, *supra*, 384 U.S. at 654 n.14; *Cannon*, *supra*, 441 U.S. at 698-699.

²⁹ The courts of appeals unanimously agree that Section 504 can be enforced through a private right of action. *Miener v. State of Missouri*, 673 F.2d 969, 973-975 (8th Cir. 1982); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1376-1380 (10th Cir. 1981); *Kling v. County of Los Angeles*, 633 F.2d 876, 878 (9th Cir.

Campbell, 431 F.Supp. 180 (E.D. Va. 1977), *vacated and remanded for consideration under Section 504*, 434 U.S. 808 (1977), a suit against Virginia officials, would seem to suggest that the Court condoned the private enforcement of Section 504. The *Kruse* order occurred only one year before Section 504 was again amended, this time to allow for the recovery of attorneys fees.

As with Title IX, a majority of this Court has also recognized a private right of action under Title VI. *Guardian's Ass'n. v. Civil Service Comm. of the City of New York*, *supra*. Without more, given the linkage between Section 504 and Titles VI and IX, this Court's *Cannon* and *Guardian's Association* decisions compel the conclusion that Congress intended Section 504 to confer a private right of action. However, in Section 504 there is considerably more evidence to demonstrate that in enacting and amending Section 504 and adding Section 505 Congress

1980); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds, sub nom University of Texas v. Camenisch*, 451 U.S. 390 (1981); *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1258 (3rd Cir. 1979); *Davis v. Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978), *rev'd on other grounds, sub nom Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Lloyd v. Regional Transp. Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977).

The United States agrees that in enacting Section 504, Congress intended to create a private cause of action. *See*, Briefs of the United States as *Amicus Curiae* filed in this Court in *Southeastern Community College v. Davis*, *supra*; *University of Texas v. Camenisch*, *supra*; *Consolidated Rail Corp. v. Darrone*, *supra*. California too is in strong agreement even where the defendant is a state instrumentality and is sued in federal court. *See* Brief of California as *Amicus Curiae*, *Southeastern Community College v. Davis*, *supra*. *Davis* and *Camenisch* both involved suits against state instrumentalities in federal court. In the Court of Appeal below, the United States argued strenuously that section 504 created a private right of action against the state in federal court. Ninth Circuit Br. of U.S. at 29-43.

intended to create a private right of action. The history of Sections 504 and 505, like that of Title IX,

“[f]ar from evidencing any purpose to *deny* a private cause of action, . . . rather plainly indicates that Congress intended to create such a remedy.”

Cannon, supra, 441 U.S. at 694. The Committee Report on the 1974 Amendments states that:

“This approach to implementation of section 504, . . . would permit a judicial remedy through a private action.”

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 40 (1974) (emphasis added). This intent is confirmed by the addition of an attorney’s fee provision to Title V of the Act in the 1978 Amendments, Section 505(b), 29 U.S.C. § 794(b). The legislative history underlying this attorneys’ fee provision supports this reading. The Senate report on Section 505(b) states:

“The committee believes that the rights extended to handicapped individuals under title V, that is, . . . nondiscrimination under Federal grants—are, and will remain in need of constant vigilance by handicapped individuals to assure compliance, and the availability of attorney’s fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504.”

S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978) (emphasis added); see also, H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 21 (1978). A similar attorney’s fees provision in Title IX, construed by this Court in *Cannon*, led to the conclusion that

“[t]he language of this provision explicitly presumes the availability of private suits to enforce [Title IX]. . . .”

441 U.S. at 699.

The Congressional debates on Section 505 state unequivocally that it was intended to apply to private plaintiffs. 124 Cong. Rec. 30346-30347 (1978) (remarks of Senator Cranston); 124 Cong. Rec. 37507-37508 (1978) (remarks of Senator Stafford). Moreover, Senate floor debate in 1978 on Section 505 reveals that Congress was keenly aware of judicial precedent on the private right of action issue. 124 Cong. Rec.

30349 (1978) (remarks of Senator Bayh).³⁰ Several Courts of Appeals decisions found that a private right of action existed prior to the 1978 Amendments. *Lloyd v. Regional Transp. Authority*, 548 F.2d 1277, 1284-87 (7th Cir. 1977); *Kampmeir v. Nyquist, supra*, 553 F.2d 296, 299 (2d Cir. 1977) (a suit against, among others, a state); *Leary v. Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977); *Davis v. Southeastern Community College, supra*, 574 F.2d at 1159.

The seeds of Section 505 were fully sown in 1977. See H.R. 8862, 95th Cong., 1st Sess. (1977). In that year during the 1977 Section 504 Implementation Hearings, *supra*, Congress was explicitly told of the need for an attorney's fees provision to enhance and strengthen private enforcement of Section 504. In no uncertain terms several witnesses stated that because of HEW administrative complaint processing delays, the need to encourage private enforcement was imperative. See, 1977 Section 504 Implementation Hearings, *supra*, 215, 234, 245, 257-

³⁰ In addition to the cases cited by Senator Bayh, there were several employment cases decided under Section 504 prior to the 1978 Amendments. See, *Whitaker v. Board of Higher Education*, 461 F.Supp. 99, 106-109 (E.D. N.Y. 1978); *Davis v. Bucher*, 451 F.Supp. 791 (E.D. Pa. 1978); *Duran v. City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977), 451 F.Supp. 954 (M.D. Fla. 1978); *Drennon v. Philadelphia General Hospital*, 428 F.Supp. 809 (E.D. Pa. 1977).

As early as 1976 Congress was explicitly told of a number of other cases brought under Section 504. See, *Oversight Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same By Agencies Under the Rehabilitation Act of 1973, before the Senate Subcommittee on the Handicapped of the Committee on Labor and Public Welfare*, 94th Cong. 2d. Sess. (1976) at 490-495 (1976 Senate Oversight Hearings). Congress knew from other sources much earlier. 120 Cong. Rec. 15743-151744 (1974) (remarks of Rep. Biaggi).

At no time did any member of Congress express disapproval of such private suits.

262, 303. The head of HEW's Office of Civil Rights, which had jurisdiction over Section 504 complaints, stated:

"I believe it is important that the private right of action for individuals be preserved. HEW is not in a position and does not have the resources to do the whole job. Therefore, it is important that handicapped individuals have available as many avenues of resource as possible. . . .

Having been a civil rights lawyer, I can assure you one of the best ways to encourage litigation and make it possible for the indigent handicapped to seek redress in the courts, is to make provision for the award of attorneys' fees. . . .

Id. at 358 (Statement of David Tatel).³¹

Congress responded to this testimony by enhancing the remedies available to private parties and encouraging further federal private suits. *S.Rep.* No. 95-890, *supra*, at 18; *H. Rep.* No. 95-1149, *supra*, at 21.

Post 1978 Congressional statements likewise strongly support private enforcement rights:

It is, and has always been the Committee's intent that *any handicapped individual aggrieved by a violation of Title V [Section 504] has the right under existing law to proceed privately in federal court to enforce the rights and remedies afforded under title V of the Rehabilitation Act of 1973, as amended, and to receive back pay and attorneys' fees if successful.*

S. Rep. No. 96-316, 96th Cong., 1st Sess. (1979) at 12-13. (Emphasis added).

There simply is no support in the history of Sections 504 and 505 for the proposition that Congress sought to limit the courts to which private parties enforcing Section 504 could go. When Congress wanted to limit the relief available under Sections 504 and 505, it knew how to do so and so stated. *See, e.g.*, 124

³¹ *See also, Whitaker v. Bd. of Higher Ed.*, *supra*, 461 F.Supp. at 108-09, in which Michael Middleton, the Director of Policy and Procedure for HEW's Office of Civil Rights, filed a declaration to the same effect.

Cong. Rec. 30,576-30,579 (1978) [Amendments to Section 505(a)(1), 29 U.S.C. § 794a(a)(1)].

There is also no support for California's and the United States current implicit position (Pet. Br. at 27-28, Br. of U.S. at 16 n.11) that if a cause of action exists in federal court under Section 504, such an action exists only by virtue of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and must satisfy the "fiction" of *Ex parte Young*, 209 U.S. 123 (1908), before relief can be granted. During the 1977 Section 504 Implementation Hearings, *supra*, at 262-265, Congress was explicitly told of the limitations of a Section 1983 cause of action, that it applied only to suits against public officials and that plaintiffs bringing suits directly under Section 504 could not recover attorney's fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 USC § 1988. Congress was also told that 70% of the administrative complaints filed with HEW alleged employment discrimination. *Id.* at 341. Moreover, Congress was well aware from as early as 1976 that numerous Section 504 suits were being brought directly against public entities and not just against individuals. See, 1976 Senate Oversight Hearings, *supra*, at 494-495; also notes 20 and 30, *supra* and accompanying text. With this history, the 1978 Amendments can only be viewed as Congress' express approval of all federal private enforcement actions and as a desire on the part of Congress to remove all hurdles to effective enforcement of Section 504. Nothing in the legislative history of Sections 504 and 505 even remotely suggests that Congress intended to codify the *Ex parte Young* fiction within these sections as a predicate for successful federal court action.³²

³² When Congress intended to codify existing practice into Section 504 it said so. S.Rep. No. 95-890, *supra*, at 19. If Congress was satisfied with enforcement of Section 504 under Section 1983 and if Congress wanted to preserve the *Ex parte Young* fiction within Section 504 proceedings, it did not need to add a separate attorney's fees provision to the Rehabilitation Act. The Civil Rights Attorney's Fee Act of 1976, 42 U.S.C. § 1988, already allowed for recovery of

C. Under Existing Case Law The Eleventh Amendment Does Not Bar This Suit.

1. Congress has abrogated California's Eleventh Amendment Immunity.

In enacting Sections 504 and 505 Congress has brought "the states to heel." *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 283 (1973). Unmistakeably, Section 504 deliberately imposes substantive requirements on the states. See Part 1A *supra*. Thus, Section 504 is markedly different from other acts that merely declare policy, *Pennhurst State School v. Halderman*, 451 U.S. 1, 19 (1981), or are merely cooperative federal-state programs. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Florida Dept. of Health v. Fla. Nursing Home Ass'n.*, 450 U.S. 147 (1981).

Moreover, the Congress utilized its enforcement powers under Section 5 of the Fourteenth Amendment both to create the requirements of Section 504 and to reinforce them through private action against a class of defendants that literally included the states. See Part 1B *supra*; *Fitzpatrick v. Bitzer*, *supra*; *Hutto v. Finney*, *supra*. Consequently, "the threshold fact of congressional authorization to sue a class of defendants which literally includes States," *Edelman v. Jordan*, *supra*,

attorneys' fees in suits brought under Section 1983 against public officials.

Ironically, in *Brown v. Pitchess*, 13 Cal.3d 518, 119 Cal.Rptr. 204, 531 P.2d 772 (1975), the California Attorney General vigorously argued against concurrent state and federal court jurisdiction over federal civil rights claims on the ground, *inter alia*, that a finding of concurrent jurisdiction would loose a "Johnstown flood of litigation" which would "inundate the judicial system of this State." *Id.*, 13 Cal.3d at 522.

Furthermore, California's position appears to be internally inconsistent. If a state is deliberately included by Congress within a "class of defendants" against whom federal suit can be brought, *Edelman v. Jordan*, *supra*, 415 U.S. at 672, then Eleventh Amendment immunity has been abrogated. *Id. Ex parte Young* would not apply in such a situation.

415 U.S. at 672, is present in Section 504. *Fitzpatrick v. Bitzer*, *supra*, 427 U.S. at 456, and *Hutto v. Finney*, *supra*, 437 U.S. at 693-698 & n.31, both recognize that where Congress acts pursuant to its powers under the Fourteenth Amendment, and deliberately includes the states within the class of defendants affected by private federal court suit under the statute, the Eleventh Amendment is not a bar to the action.

The Court should reject California's and United States' interpretation of *Edelman v. Jordan*, *supra*, and *Quern v. Jordan*, 440 U.S. 332 (1979), Pet. Br. at 30-51; Br. of U.S. at 13-17. This Court has never held that Fourteenth Amendment legislation needs to comply with rituals and needs to specify in so many words that the Eleventh Amendment was being abrogated. Not only is such a requirement a redundancy, *Ex parte Virginia*, *supra*, but a substantial curtailing of legislative authority.

Moreover, Section 504 was considered and enacted in 1972 and 1973 prior to *Edelman* and *Quern*. At that time this Court's decision in *Parden v. Terminal Railway of Alabama State Docks*, *supra*, was the standard by which Congress' intentions to subject the states to suit were tested—namely whether the class Congress subjected to suit under a federally created cause of action included states. *Id.*, 377 U.S. at 187-190.³³ Congress in enacting Section 504 used the term recipients which literally—and intentionally—included states. See Part 1A *supra*. Congress complied with *Parden* and that should be all that is required.

There are no countervailing considerations that militate against this conclusion. Unlike the Fair Labor Standards Act (FLSA), a non-Fourteenth Amendment act construed in *Employees v. Missouri Public Health Dept.*, *supra*, Section 504 does not envision enforcement to be exclusively or even primarily by the federal government. In fact, Congress took

³³ See also, *Edelman v. Jordan*, *supra*, 415 U.S. at 670 n.13, cataloguing cases where this Court summarily affirmed federal court decisions ordering the payment of retroactive benefits.

steps to enhance private enforcement of Section 504 after being told by advocates and the administration alike that administrative enforcement was a dismal failure. *See 1977 Section 504 Oversight Hearings, supra*, at 215, 234, 245, 259, 260, 303, 341, 358. In addition, unlike under the FLSA, states are treated no differently than are other recipients under Section 504. *See S. Rep. No. 96-316, supra* at 12-13.

Contrary to the new position of the United States, the fact that damages have been prayed for does not change the result. The United States forgets that in enacting Section 504 Congress has provided for federal court suit and has limited states' rights. In so doing Congress specifically excluded no remedies. *Cf. Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). California cannot have an expectation of escaping financial liability when it engages in intentional discrimination in clear violation of Section 504. *Cf., Guardian's Association, supra*, 103 S.Ct. at 3229-3230 (White, J.); *Darrone, supra*, 104 U.S. at 1252-1253, and nn.9-10. Such relief is crucial to deter future employment discrimination, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-423 (1975), which is one of the principal targets of Section 504. *Darrone, supra*, 104 S.Ct. at 1253-1254.³⁴ Furthermore, in the posture of this case, there is no proof that a retrospective damage award would be "enormous," *Quern v. Jordan*, 440 U.S. 332, 344 n.16 (1979),³⁵ or

³⁴ HEW's regulations put California on notice long ago that it would have to take "remedial action" to correct acts of discrimination, 45 C.F.R. § 84.6 and App. A ¶ 9. These regulations also warned the states of the likelihood of private enforcement. 45 C.F.R. § 84, App. A ¶ 8, *See S. Rep. 9-316, supra*, at 12-13. When Congress was concerned about the costs imposed by Section 504 it so stated. *See, supra*, notes 20 and 31-32 and accompanying text.

³⁵ J.A. at 9, ¶ 8. It is not inconceivable that statutory attorney's fees in this and numerous other Section 504 damage actions could exceed the damage recovery. *Cf., Coop v. South Bend*, 635 F.2d 652 (7th Cir. 1980); *Perez v. University of Puerto Rico*, 600 F.2d (1st Cir. 1979); *Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978); *see also, Larson, Federal Court Awards of Attorney's Fees* (1981). Yet unmistakably Congress has the power to impose such fees upon the States. *Hutto v.*

that it would necessarily come out of the state treasury. *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945).³⁶

The position newly advanced by the United States would gut the act. Congress passed Section 504 knowing that it would cost the states their own money to comply. Despite this the rule advanced by the United States would allow the states to escape federal court liability whenever the state had to expend money to remedy an act of discrimination. As the United States observed before this Court in only a slightly different context, *Univesity of Texas v. Camenisch*, 451 U.S. 390 (1981), Br. of United States as *amicus curiae* at 19:

"If accepted, petitioners' contention . . . would signal the end of nearly all compulsory measures to aid the handicapped under Section 504. Recipients of federal funds would not have to build a single ramp to make . . . buildings accessible to handicapped persons. They would not be required to modify a single bathroom so that it could be used by handicapped persons. They would not be obligated to undertake any effort at all to enable qualified persons to participate in federally funded programs where that effort involved the slightest identifiable expense. This cannot be what Congress intended. . . . [The Court] should decline petitioners' invitation to construe the statute in such a way as to drain it of nearly all practical impact."

When states accept federal financial assistance, they agree to comply with the provisions of Section 504. If states nonetheless discriminate they should not be permitted to escape the logical federal court consequences of that discrimination. To hold otherwise would be to sanction the use of at least some federal monies in a discriminatory manner, precisely the result Congress sought to eliminate by enacting Section 504. Dam-

Finney, supra. Moreover, in exchange for the billions of dollars in federal assistance received by California, *see* note 2, *supra*, it is not unrealistic to expect the state to pay retrospective relief when it intentionally violates Section 504. *Compare, Pennhurst I, supra*, 451 U.S. at 24.

³⁶ It could, for instance, come out of any unspent portion of federal financial assistance or some other non-state grant.

ages may be the only appropriate form of relief in an employment dispute such as this. *Cf. Davis v. Passman*, 442 U.S. 228, 245 (1979); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395 (1971). Since federal grants are of a limited duration, by the time judicial resolution occurs there may be no job or federally funded program in which to place a prevailing plaintiff. For a plaintiff such as Scanlon it may well be damages or nothing.

Moreover, the result urged by the United States would force Section 504 plaintiffs into state courts even though federal civil rights have long been vindicated in federal court. *Mitchum v. Foster*, *supra*; *Ex parte Virginia*, 100 U.S. 339, 346 (1880). Such a result could not have been expected by Congress. If handicapped persons nonetheless wish to pursue their federal court rights, they either will have to file two separate lawsuits or will have to rely on administrative enforcement by the federal government for retrospective relief—something which has yet to occur in this case, even though HEW found the State in violation of Section 504 over 6 1/2 years ago. J.A. at 13. Surely Congress enacted Section 504 and enhanced it with Section 505 to give federal plaintiffs viable remedies. *Dopico v. Goldschmidt*, 687 F.2d 644, 643 (2d Cir. 1982); *Bell v. Hood*, 327 U.S. 678, 684 (1946).

Finally, California makes too much out of the provision for Title VII remedies in Section 505(a)(1), 29 U.S.C. § 794a(a)(1), in suits against the federal government. Section 505(a)(1) suits are exclusively employment related. *See* 29 U.S.C. § 791. Hence it is reasonable to apply Title VII's requirements to such actions. In contrast, Section 504 covers employment discrimination and much more. *Alexander v. Choate*, *supra*, 105 S.Ct. at 718-719. Title VII remedies would create an additional administrative delay to enforcing Section 504 rights. As the 1977 *Section 504 Implementation Hearings*, *supra*, indicate, Congress enacted Section 505 to remove such delay. *See also*,

Lloyd v. Regional Transportation Authority, *supra*, 548 F.2d at 1284-1288.³⁷

2. California has waived its Eleventh Amendment Immunity.

Article III, Section 5, of the California Constitution provides:

Suits may be brought against the State in such manner and in such courts as shall be directed by law.

The California Supreme Court in *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211, 217, 11 Cal.Rptr. 89, 359 P.2d 457 (1961), a case which swept away governmental immunity,³⁸ held Article III, Section 5, previously codified at Article XX, Section 6, constituted the state's consent to be sued. As a consequence, in California, unless immunity is affirmatively imposed by the legislature, no such immunity exists.³⁹

³⁷ Similarly, California's arguments under other statutes are misdirected. Pet. Br. at 58-62. The inquiry here is not whether Congress can abrogate states' Eleventh Amendment immunity in some other fashion but, rather, whether in the context of this statute Congress has abrogated any immunity of the state.

³⁸ The state Supreme Court in *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961), "discarded as mistaken and unjust" "the rule of governmental immunity from tort liability." 55 Cal.2d at 213. In so doing, the court noted that the doctrine of governmental immunity was originally court made (55 Cal.2d at 218), and was now an anachronism without rational basis which had continued only by the force of inertia. 55 Cal.2d at 216. The Court noted that the maxim "the King can do no wrong" appeared to originally mean only that the King was not privileged to do wrong. 55 Cal.2d at 214 n.1. See, generally, Note, *Torts: Sovereign Immunity: Scope of Doctrine Severely Limited in California* 49 Calif.L.Rev. 400 (1961).

³⁹ In response to *Muskopf*, the legislature enacted moratorium legislation (Chapter 1404, Statutes of 1961), pending enactment of a comprehensive legislative scheme by Chapter 1618, Statutes of 1963, California Gov't. Code §§ 800 *et seq.* The moratorium froze the *status*

No procedural barrier has been enacted by the state legislature to limit federal question suits against the state. In this respect California's laws differ substantially from the laws of other states.⁴⁰

In *Florida Dept. of Health v. Florida Nursing Home Ass'n*, *supra*, there was no constitutional provision that made the department amenable to suit and the statute that was implicated only involved suit on contracts. In *Alabama v. Pugh*, 438 U.S. 781 (1978), the constitutional provision was the opposite of California's. It provided that "the State of Alabama shall never be made a defendant in any Court of law or equity." *Id.* at 782. In *Pennhurst State School Hosp. v. Halderman*, 104 S.Ct. 900, 909 n.12 (1984) (*Pennhurst II*), this Court pointed to no Pennsylvania constitutional provision which constituted waiver of Eleventh Amendment immunity. Further, enactment of 42 Pa. Cons. Stat. § 8521(b) (1980), which expressly withheld waiver of Eleventh Amendment rights during the

quo ante Muskopf during the drafting period. See also, *Harland v. State of California*, 99 Cal.App.3d 839, 845-846, 160 Cal.Rptr. 613 (1979)(held state subject to postjudgment interest like all other litigants where legislature had not expressly exempted state). *Accord*, *Green v. California*, 73 Cal. 29, 32-33 (1887)(once state consents to suit, subject to the same rules as ordinary litigants).

⁴⁰ That difference was recognized by this Court in *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 50-51 (1944), in its discussions of *Smith v. Reeves*, 178 U.S. 436 (1900), a case brought in federal court by railroad receivers against the California treasurer to recover previously paid state taxes. This court noted that California law, unlike the law of other states, permitted suits against governmental officials in their official capacity. *Great Northern Life Ins. Co. v. Read*, *supra*, 322 U.S. at 50-51. However, this Court found the Eleventh Amendment barred the state law claims because of the political nature of tax collection (*Id.* at 51), and because of the statutory conditions precedent to suit, in particular, the statutory right of removal to Sacramento County Superior Court. *Smith v. Reeves*, *supra*, 178 U.S. at 441. Here we are dealing with the vindication of federal civil rights, a matter not traditionally exclusively within the province of the states. *Cannon*, *supra*, 441 U.S. at 708-709.

course of the litigation, operated to cut-off any federal court actions which had not vested by a final judgment. *Beers v. Arkansas*, (20 How.) 527 (1858).

California's Fair Employment and Housing Act, California Government Code §§ 12900 *et seq.*, to which California has directed the Court's attention, Pet. Br. at p. 29, n.6, expressly acknowledges a federal court remedy for employment discrimination, including handicap discrimination. It merely limits the scope of the action permissible in state court when there is a federal action pending.⁴¹

In the circumstances of this case where a federal statute creates rights against California and the state has enacted no bar to federal suit, the state is amenable to suit in all forums.

3. California has consented to suit

As California admits, Pet. Br. at 27-28, Section 504 creates a privately enforceable federal cause of action against it. In this situation, by voluntarily participating in a host of federal assistance programs, California has consented to suit. *Parden v. Terminal Ry. of Alabama State Docks*, 377 U.S. 184 (1964); *Petty v. Tennessee-Missouri Comm'n.*, 359 U.S. 275 (1959).⁴²

⁴¹ Calif. Gov't. Code § 12965(b) provides in pertinent part:

" . . . Such actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where such persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants . . ."
Calif. Gov't. Code § 12965(b).

This is state legislation which by its "express language" or "overwhelming implications" acknowledges that California is amenable to suit in federal court. *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

⁴² Neither California nor the United States contests that Section 504 is validly enacted pursuant to Article I, Section 8. There can be little doubt of the ability of Congress to set conditions on the grant of federal money. *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Oklahoma*

Moreover, under federal and California law, the State by participating in a federally regulated activity "must be held to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent." *Maurice v. State of California*, 43 Cal.App.2d 270, 277 (1941).⁴³ The California Supreme Court in *Hall v. University of Nevada*, 8 Cal.3d 522, 524, 105 Cal.Rptr. 355, 503 P.2d 1363 (1972), *cert. denied*, 414 U.S. 820 (1973), endorsed the principles articulated in *Parden* and *Maurice*, namely that "the state by engaging in . . . [federally regulated conduct] and thereby subjecting itself to the federal legislation must be deemed to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent." *Id.* at 524.⁴⁴

v. Civil Service Commission, 330 U.S. 127, 142-143 (1947); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *Fullilove v. Klutznick*, *supra*, 448 U.S. at 474-475.

⁴³ The reasoning of *Maurice v. California*, 43 Cal.App.2d 270 (1941), was considered persuasive in *Parden v. Terminal Ry. of Alabama State Docks*, *supra*, 377 U.S. at 193.

⁴⁴ Differences among the states' laws result in differences in the application of the Eleventh Amendment. This Court in *Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975), noted the differences between Iowa and Indiana law. Under Indiana law, appearance and failure to raise sovereign immunity in the district court would not bar raising the defense later—even in the Supreme Court. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 466-467 (1945). Under Iowa law, however, "the State consents to suit and waives any defense of sovereign immunity by entering a voluntary appearance and defending a suit on the merits." *Sosna v. Iowa*, *supra*, 419 U.S. at 396 n.2. Thus while under the law of other states no sovereign immunity consequences are triggered by participating in a federally regulated activity, such is not the case under California law.

II. *HANS V. LOUISIANA* SHOULD BE OVERRULED. ITS EXTENSION OF THE ELEVENTH AMENDMENT TO BAR FEDERAL COURT JURISDICTION OVER FEDERAL QUESTION CASES IS CONTRARY TO THE ELEVENTH AMENDMENT'S ORIGINAL MEANING.

Respondent believes that Congress in enacting Section 504 abrogated any Eleventh Amendment immunity California may possess and that California has waived its Eleventh Amendment immunity and has consented to suit. If, however, this Court finds no abrogation, waiver or consent, then respondent urges this Court to reconsider and to overrule *Hans v. Louisiana* insofar as *Hans* limits federal court jurisdiction over federal question cases.

In recent years constitutional historians have been in virtually unanimous agreement that the historical analysis on which *Hans* was based was faulty.⁴⁵ *Hans* and its progeny have in recent years spawned a confusing and unpredictable series of opinions. Despite the decision in *Hans*, over the eleven years since *Edelman v. Jordan*, *supra*, this Court has decided numerous cases⁴⁶ brought against state agencies, whose very title announced the presence of a jurisdictional problem. Compare *Monell v. New York City Department of Social Services*, 436 U.S. 658, 663 n.5 (1978). *Hans* and its progeny are unsound

⁴⁵ See Appendix B listing. Counsel for *Hans* did not question the historical analysis advanced by the State of Louisiana and accepted by the Court.

⁴⁶ See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); *University of Texas v. Camenisch*, 451 U.S. 390 (1981); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Ohio Bureau of Employment Serv. v. Hodony*, 431 U.S. 471 (1977); *Scott v. Kentucky Parole Board*, 429 U.S. 60 (1976); *Virginia State Board of Pharmacy v. Virginia Citizens*, 425 U.S. 798 (1976); *Hawaii Housing Authority v. Midkiff*, 81 L.Ed.2d 186 (1984); *NCAA v. Board of Regents of University of Oklahoma*, 82 L.Ed.2d 70 (1984); *Minnesota State Board for Community Colleges v. Knight*, 79

in principle and unworkable in practice. Cf. *Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913 (February 19, 1985). The time has come to reconsider whether *Hans* was properly decided. "The political process [and not the Court] insures that laws that unduly burden the States will not be promulgated." *Id.*, Slip Op. at 27.

A. The Adoption Of Article III.

By the end of the eighteenth century the common law doctrine of sovereign immunity had been so circumscribed that it no longer could be utilized to deny a subject otherwise appropriate relief.⁴⁷ Blackstone devoted several sections of his *Commentaries* to the judicial remedies available to subjects "in case the crown should invade their rights."⁴⁸ Most of the colonial governments had themselves been subject to suit in American courts. Six colonies had charters expressly authorizing such suits,⁴⁹ and the grantees of the three proprietary colonies,⁵⁰ being natural persons, were also subject to suit. Several of the states adopted as part of their constitutions the old colonial

L.Ed.2d 299 (1984); *Public Service Commission v. Mid-Louisiana Gas Co.*, 77 L.Ed.2d 668 (1983); *New Mexico v. Mescalero Apache Tribe*, 76 L.Ed.2d 611 (1983); *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission*, 75 L.Ed.2d 752 (1983).

⁴⁷ Jaffee, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 1819 (1963). Jacobs cites several examples of actions for property or funds successfully maintained against the government. C. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 5-6, 20, 165-66 nn.6, 7 (1972) See also Borchart, *Government Liability in Tort*, 34 Yale L.J. 1 (1924).

⁴⁸ W. Blackstone, *Commentaries on the Laws of England*, I, 241-44; III, pp. 47-48.

⁴⁹ Massachusetts, Connecticut, Rhode Island, New Hampshire, Georgia and Virginia (1609 Charter). Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Col. L. Rev. 1890, 1896-97 nn.29-34 (1983) (Gibbons).

⁵⁰ New York, Maryland and Pennsylvania.

charters subjecting the government to suit,⁵¹ and Pennsylvania and Virginia⁵² wrote into their laws an express disavowal of any immunity.⁵³

The proceedings of the Convention which approved Article III contain no evidence suggesting that the delegates read Article III to contain any unspoken exceptions to its literal language. The Committee of Detail which drafted Article III left no records explaining its interpretation of that provision, although it appears that it was James Wilson of Pennsylvania who suggested including jurisdiction over litigation between a state and a citizen of another state.⁵⁴ However, there are records from the ratification debate. These records plus the chronology of that debate are of critical importance to an understanding of the Eleventh Amendment.

The first commentary on the citizen-state diversity clause came in one of a series of letters by Tench Coxe, written under the pseudonym "American Citizen," which was widely reprinted in American newspapers in the fall of 1787 and subsequently circulated as a pamphlet.⁵⁵ Coxe urged:

[W]hen a trial is to be had between the citizens of any state and . . . the government of another, the private citizen will not be obliged to go into a court constituted by the state, which . . . his dispute is. He can appeal to a dis-

⁵¹ Connecticut and Rhode Island. See Gibbons, *supra* note 49, at 1898, n.42.

⁵² Laws of Virginia, 1794, c.85.

⁵³ Even if state had enjoyed immunity from suit in its own courts, under prevailing legal principles that immunity would not have extended to suit in the court of another sovereign, be it the court of a fellow state or the newly formed federal government. *Nevada v. Hall*, 440 U.S. 410, 414 (1979).

⁵⁴ Mathis, *The Eleventh Amendment: Adoption and Interpretation* 2 Ga. L.Rev. 207, 211 n.16 (1968).

⁵⁵ P. Ford, *Pamphlets on the Constitution of the United States*, 133 (1888).

interested federal court. This is surely a great advantage, and promises a fair trial, and an impartial judgment.⁵⁶

Coxe's interpretation of Article III, was shared by Richard Henry Lee, a leading opponent of ratification. Lee's views first appeared in a series of letters to a New York newspaper from "The Federal Farmer."⁵⁷ Lee's letter of October 10, 1787, sharply questioned the propriety of authorizing suits against states by citizens of other states or of foreign countries.⁵⁸ That was the state of the public debate in early December of 1787 when Delaware became the first state to ratify the Constitution. Any member of that convention familiar with the pamphleteering of the day could only have concluded that Article III was to be read literally.

The initial agreement as to the meaning of Article III was to continue unquestioned for almost seven months. On December 4, 1787, James Wilson, a member of the committee which had drafted Article III, argued at the Pennsylvania convention that permitting citizens of one state to sue another state in federal court was necessary both to assure fairness and to encourage commerce:

Impartiality is the leading feature in this Constitution; it prevades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing. . . .⁵⁹

Wilson also defended the exercise of federal jurisdiction over suits against a state brought by foreign nationals.⁶⁰ Wilson insisted that federal jurisdiction was proper over suits brought by the United States against a state.⁶¹ A week later, a letter to

⁵⁶ *Id.* at 149.

⁵⁷ *Id.* at 277.

⁵⁸ *Id.* at 309.

⁵⁹ 2 *The Debates in The Several State Conventions of the Adoption of the Federal Constitution* 491 (J. Elliot, Ed. 1866).

⁶⁰ *Id.* at 491-492.

⁶¹ *Id.* at 490. Wilson had earlier attacked suggestions that the states should be treated as sovereigns. *Id.* at 457.

the Massachusetts Gazette from Agrippa objected to the fact that the proposed constitution subjected a state to suit in federal court by its own citizens.⁶² In the face of these consistent interpretations of Article III both Pennsylvania and Massachusetts ratified the Constitution.

An essay by "Brutus" appeared in the February 21, 1788, New York Journal, attacking the creation of federal jurisdiction over suits against a state by citizens of another state:

I conceive the clause which extends the power of the judicial to controversies arising between a state and citizens of another state, improper in itself, and will, in exercise, prove most pernicious and destructive.⁶³

Despite the fact that Brutus had accurately foreseen the problem which would later come to a head in *Chisholm v. Georgia*, 2 Dall. 419 (1793), his argument prompted no immediate response. The constitution was subsequently ratified by New Jersey, Georgia, Connecticut, Maryland, South Carolina and New Hampshire.⁶⁴ Since New Hampshire was the ninth state to ratify, its action was sufficient under Article VII to put the new Constitution into effect.

The other two states to ratify the Constitution⁶⁵ were Virginia and New York. Virginia is the only state of the thirteen which considered the Constitution in which any member of the ratifying convention suggested that states might not be subject to suit under Article III. George Mason, who opposed virtually all of the grants of jurisdiction in Article III, objected

⁶² 4 *The Complete Anti-Federalist* 78 (H. Storing, Ed. 1981).

⁶³ 2 *The Complete Anti-Federalist* 429 (H. Storing, Ed. 1981).

⁶⁴ North Carolina and Rhode Island initially refused to ratify the Constitution, agreeing to do so in 1789 and 1790, respectively, only after the Constitution had gone into effect.

⁶⁵ New Hampshire ratified the Constitution on June 21, 1788. Although a new interpretation of Article III had been offered the day before in Virginia, it was of course impossible for anyone in New Hampshire to have known that that had occurred.

to the citizen-state diversity clause insofar as it authorized a private individual to sue a state of which he was not a citizen.⁶⁶ Two days later, on June 20, Madison and Marshall both advised the convention that the clause at issue only authorized suits in which a state was a plaintiff.⁶⁷ But those who opposed subjecting the states to suit under that clause simply did not accept that unlikely explanation of its meaning. Patrick Henry responded to Madison:

As to controversies between a state and the citizens of another state, his construction of it is to me perfectly incomprehensible. . . .⁶⁸

Equally significant, other proponents of Article III rejected the Marshall-Madison reading, and defended subjecting states to suit in federal court. Governor Randolph expressly disavowed that strained reading.⁶⁹

Edmund Pendleton, the president of the Virginia convention, similarly defended "the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party."⁷⁰ In light of the consistent interpretation of Article III over the first eight months of the ratification process, which interpretation was openly supported by Randolph

⁶⁶ 3 *The Debates in The Several State Conventions of the Adoption of the Federal Constitution* 526-27 (J. Elliot, Ed. 1866) ("claims respecting . . . lands, every liquidated account, or other claim against this state, will be tried before the federal court. is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender?")

⁶⁷ *Id.* pp. 533 (Madison), 555-6 (Marshall). The sincerity of these representations has been questioned. See Gibbons, *supra*, 83 *Col L.Rev.* at 1907 (1893).

⁶⁸ Elliot, *supra*, v. 3, p. 543. Similarly, Madison's suggestion that a state could not be sued by a foreign nation in federal court unless the state first consented, (*id.* at 533) was rejected by Grayson, *Id.* at 567.

⁶⁹ *Id.* at 573.

⁷⁰ *Id.* at 549.

and Pendleton, it is difficult to believe that any delegate to the Virginia convention who opposed the prospect of a state being sued in federal court could have been persuaded by the statements of Madison and Marshall that the Constitution meant no such thing. The convention's conclusion regarding this controversy was clearly indicated by its decision to propose to the other states a constitutional amendment to repeal in its entirety the citizen-state diversity clause.⁷¹

The New York convention would be of little significance to the construction of Article III but for the dates on which it occurred. No member of that convention spoke in favor of or in opposition to lawsuits against the states in federal court. While the New York convention occurred after the publication of *The Federalist* No. 81, which was heavily relied on in *Hans*, 134 U.S. at 12-13, there is no direct evidence that No. 81, published on July 4 and 8, 1788, or the issues it raised influenced, or were of concern to, the New York convention. At the New York convention no delegate, not even Hamilton who had written No. 81, relied during the debates on the ideas No. 81 contained regarding Article III.⁷²

Any delegate to the New York convention who did read the *Federalist* might well have understood its interpretation of Article III quite differently from that suggested by *Hans*. The general analysis of federal jurisdiction is contained in No. 80 of *The Federalist*, not No. 81. No. 80 defends the citizen-state diversity clause:

The power of determining causes . . . between one State and the citizens of another . . . is . . . essential to the peace of the Union.

. . . [T]he national judiciary ought to preside in *all* cases in which one State or its citizens are opposed to another States or its citizens. . . .⁷³

⁷¹ *Id.* at 660-661.

⁷² *The Federalist Papers*, xi (Mentor Ed., 1961) (introduction by Clinton Rossiter).

⁷³ *Id.* at 477-78 (emphasis added)

The passage relied on by *Hans* is contained in a "digression" in a part of No. 81 otherwise unrelated to the scope of federal jurisdiction. That digression is not, however, a general analysis of Article III or the citizen-state diversity clause, but is limited to the narrow issue of whether state bonds could be enforced in federal court by assigning them to a citizen of another state. Hamilton insisted as a matter of substantive law that public securities could not be enforced in that manner.⁷⁴

North Carolina and Rhode Island, both acting after the publication of No. 81, initially refused to ratify the Constitution. In North Carolina William Davie, a former delegate to the constitutional convention, defended Article III:

[T]he federal courts should have cognizance of controversies between two or more states, [and] between a state and the citizens of another state. . . . Its jurisdiction in these cases is necessary to secure impartiality in decisions, and preserve tranquility among the states. It is impossible that there should be impartiality when a party affected is to be judge.⁷⁵

A majority of the convention clearly disagreed with Davie's argument, though it evidently concurred in his interpretation of Article III. Sitting as a committee of the whole it adopted a resolution calling for the amendment of Article III to eliminate citizen-state diversity jurisdiction.⁷⁶ The convention then

⁷⁴ *Id.* at 487-88: It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. (emphasis in original.)

⁷⁵ Elliot, *supra*, note 59, v.4 p. 159.

⁷⁶ *Id.* at 246.

voted down a proposal to ratify the constitution as written.⁷⁷ In 1790, after the constitution had gone into effect, Rhode Island too finally gave its approval, but simultaneously proposed a constitutional amendment that would have barred federal jurisdiction over any suit commenced against a State.⁷⁸

B. The Adoption Of The Eleventh Amendment.

The adoption of the Eleventh Amendment was precipitated by this Court's decision in *Chisholm v. Georgia*, 2 Dall. 419 (1793), holding that a state was subject to suit for the payment of an ordinary debt. The view that *Chisholm* was inconsistent with a pre-existing national understanding as to the meaning of Article III is difficult to reconcile with the composition of the majority in that decision. Justice Wilson had been a delegate to the constitutional convention, a member of the committee which drafted Article III, and a delegate to the Pennsylvania ratifying convention. Justice Blair not only served at the constitutional convention, but participated in the Virginia convention, the only state convention at which the *Hans* interpretation of Article III had been aired. Chief Justice Jay served at the New York convention, and as a co-author of *The Federalist* was certainly familiar with the content and intended meaning of Nos. 80 and 81. Justice Cushing had been a member of both the national and the Massachusetts convention.⁷⁹ Attorney General Randolph, who served at both the national and Virginia conventions, undertook to represent the plaintiffs in *Chisholm* and a companion case.

Public reactions to *Chisholm v. Georgia* was far from unanimous. A committee of the Delaware Senate commended the decision, asserting that states should be "as compellable to pay

⁷⁷ *Id.* at 250-51.

⁷⁸ U.S. Department of State, *Documentary History of the Constitution*, v.ii, p. 317 (1894).

⁷⁹ 1 *The Justices of the United States Supreme Court 1789-1969*, pp. 9 (Jay), 60, 63 (Cushing), 87, 90 (Wilson), 110-111 (Blair) (L. Freidman & F. Israel, Eds. 1969).

their debts as individuals are."⁸⁰ Federalist generally applauded the opinion in *Chisholm*.⁸¹ One Federalists paper, the Connecticut Courrant, observed:

The decision . . . fixes a most material and rational feature in the judiciary of the United States. That every individual of any state has the natural privilege of suing . . . any state whatever in the Union, for redress in all cases where he can prove a just claim, a loss, or any injury having been sustained.⁸²

While the Democratic-Republicans were critical of *Chisholm*, they did not necessarily advocate absolute state immunity from all suits. The Independent Chronicle, for example, objected that *Chisholm* might lead to a flood of ordinary damage actions, particularly by Tories whose property had been seized during the Revolution, but acknowledged that suits against a state might be proper if the state had violated the federal constitution.⁸³

The distinction between the moderate position of the Independent Chronicle, and the more extreme view that states should never be subject to suit in federal court, appear throughout the period immediately preceding the framing of the Eleventh Amendment. The Virginia and North Carolina conventions took the more moderate approach, urging repeal of the citizen-state diversity clause. The Rhode Island convention, on the other hand, called for a constitutional amendment to declare that "the judicial power of the United States, in cases in which a state may be a party, does not . . . authorize

⁸⁰ Journal of the Senate of the State of Delaware (January 1794) p. 9.

⁸¹ Nowak, *The Scope of congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Co. L.Rev. 1413, 1434-6 (1975).

⁸² February 25, 1793, p. 3 col. 2.

⁸³ July 23, 1793, p. 2, cols. 1-2.

any suit by any person against a State. . . .⁸⁴ When the First Congress convened in 1789, Representative Tucker of South Carolina proposed an amendment of the narrower variety, "to strike from Article III, Section 2, the words 'between a State and citizens of another State'. . . ."⁸⁵

Legislative responses to *Chisholm* were similarly divided. In February 1793, on the day after the decision, an amendment similar to that proposed by the Rhode Island convention was introduced in the House of Representatives:

[N]o state shall be liable to be made a party defendant in any of the judicial courts, established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.⁸⁶

The next day a second and far narrowed amendment was introduced in the House:

The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.⁸⁷

Congress adjourned without taking action on either of these proposals. While Congress was in recess during most of 1793 several state legislatures adopted resolutions urging the adoption of a constitutional amendment to overrule *Chisholm*, and recommending that that amendment, like the first House pro-

⁸⁴ U.S. Department of State, *Documentary History of the Constitution*, v. ii., p. 317 (1894).

⁸⁵ Annals of Congress, 1st Cong. 1st Sess., v. ii, 762-63 The House refused to act on this proposal. *Id.* at 792.

⁸⁶ 1 C. Warren, *The Supreme Court in United States History*, 101 (1922).

⁸⁷ Annals of Cong. 1, 2d Cong., 1st Sess. v. iii, 651-52.

posed, expressly declare the states immune from suit by individuals under any circumstances.⁸⁸

When Congress reconvened in January, 1794, the dominant Federalists, who had initially supported *Chisholm*, had reversed their position. That shift was apparently rooted not in any new view of the importance of state sovereignty, but in a number of related foreign policy developments.⁸⁹ But having resolved to overrule *Chisholm*, Congress had to choose between the two very different approaches which had been proposed in its previous session.

The difference between the two proposed amendments was as clear as the difference in the scope of the opinions of Justice Blair, on the one hand, and Justices Cushing, Wilson and the Chief Justice on the other. One proposal was narrowly framed so as to overturn only the majority's construction of the citizen-state diversity clause. The second proposal was intended to overrule the majority's view that the states as such enjoyed no immunity from suit in federal court, at least where enforcement of the Constitution or laws of the United States was sought. It would not have been surprising if Congress had decided to adopt the second proposal, since that version was clearly preferred by several states. But Congress chose otherwise, voting instead to propose to the states for ratification as the Eleventh Amendment a slightly modified version of the narrower proposal.⁹⁰ Viewed from the perspective of these

⁸⁸ The Massachusetts and Virginia resolutions are reproduced in Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 Ga. L. Rev. 207, 224-26 (1968). The New Hampshire resolution is set forth in C. Jacobs, *The Eleventh Amendment and Sovereign Immunities*, 179-80 (1972).

⁸⁹ See Gibbons, *supra*, 83 Col. L. Rev. at 1926-41; Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Col. L. Rev. 1413, 1439-40 (1975).

⁹⁰ The history of these alterations is described in C. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 66-67 (1972).

developments, *Hans* and its progeny represent an attempt to read into the Eleventh Amendment the substance of the very proposal which the Third Congress quite deliberately rejected.

C. Early Interpretation Of The Eleventh Amendment.

In construing the Eleventh Amendment, substantial if not conclusive weight must be given to the interpretation placed on that provision by the Marshall Court. Two members of that Court had served in the state legislatures to which the Amendment had been referred for ratification,⁹¹ and all were active in public life during that era.⁹²

The Marshall Court consistently construed the Eleventh Amendment to be no more than a limitation on the citizen-state diversity jurisdiction clause of Article III. In *Osborn v. The Bank of the United States*, 22 U.S. (9 Wheat.) 739 (1824), the court concluded that "the amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a state, by citizens of another state, or by aliens." 22 U.S. at 857-58. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 265 (1821), Chief Justice Marshall explained that the purpose of the Amendment was only to protect the states from actions under the citizen-state diversity clause to collect state debts. 19 U.S. at 406-07. In *United States v. Bright*, 24 Fed. Cas. 1232 (Cir. Ct. 1809), Justice Washington insisted that the scope of the Eleventh Amendment should be limited to its literal language, even if doing so might in some circumstances allow "the mischief meant to be remedied." 24 Fed. Cas. at

⁹¹ *The Justices of the United States Supreme Court 1789-1969*, v.1 286 (Marshall, Virginia), 409 (Todd, Kentucky) (L. Friedman & F. Israel, Eds. 1969).

⁹² Justice Duvall was elected to Congress only a few months after it had approved the amendment (*id.* at 422), Justices Livingston and Thompson had served in the New York Legislature shortly after it ratified the amendment (*id.* at 399-40), and Justice Washington, who had been a delegate to the Virginia ratification convention in 1788, remained politically active thereafter. *Id.* at 247.

1236. "[T]he soundest and safest rule by which to arrive at the meaning and intention of [the amendment] is to abide by the words which the lawmaker used." 24 Fed. Cas. at 1235.

This literal method of construction espoused by the Marshall Court led it to interpret the Amendment in a manner directly contrary to that of *Hans* and its progeny. *Cohens* held that the state enjoyed no immunity from an action which otherwise fell within the federal question jurisdiction of the federal courts. 19 U.S. at 382-83. The Court reasoned that in ratifying the constitution the states had surrendered their sovereignty with regard to any conduct that might be prohibited by the constitution or laws of the United States. *Id.* at 380-83.⁹³ In 1883, relying on *Cohens*, this Court held that the federal question jurisdiction conferred upon the lower courts by the Judiciary Act of 1875 included jurisdiction over such actions even if brought against a state. *Ames v. Kansas*, 111 U.S. 449, 470-72 (1884).

The Eleventh Amendment was also initially construed to leave unaffected the other grants of jurisdiction in Article III.⁹⁴ Following the adoption of that Amendment, The Supreme court dismissed all cases pending before it against states by private citizens, but declined to dismiss a case brought against South Carolina on behalf of the Prince of Luxembourg.⁹⁴

⁹³ The *Madrazo* cases are consistent with Chief Justice Marshall's reasoning in *Cohen*. See Gibbons, *supra*, 83 Col. L. Rev. at 1961-1968. In *Madrazo I*, *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828), the Marshall Court avoided a disposition on Eleventh Amendment grounds. *Madrazo II*, *Ex parte Madrazo*, 32 U.S. (7 Pet.) 627 (1833), was the only pre-Civil War Supreme Court suit disposed of on Eleventh Amendment grounds. The Court found there was no admiralty jurisdiction and then dismissed because the case then fell squarely within the literal terms of the Eleventh Amendment in that the only remaining basis for jurisdiction was Juan Madrazo's status as an alien and the defendant's status as a state.

⁹⁴ See Orth, *The Interpretation of the Eleventh Amendment*, 1798-1908: A Case Study of Judicial Power, U. Ill. L.F. 423, 428 n.42 (1983).

Cohens interpreted the Amendment to have no application to actions against a state commenced by a foreign nation, 19 U.S. (6 Wheat.) at 406, and the Court interpreted that grant of jurisdiction in *Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet.) 1, 15-16 (1831). Similarly, Justice Washington, sitting as a circuit justice, held that, despite the Eleventh Amendment, states were subject to suit in an admiralty proceeding, since the Eleventh Amendment was limited on its face to actions in law and equity. *United States v. Bright*, 24 Fed. Cas. 1232 (Cir. Ct. 1809). *Osborn v. Bank of the United States* 22 U.S. (9 Wheat.) 739, 751-59 (1824), sustained a circuit court order directing the auditor of Ohio to pay the plaintiff more than \$100,000; although the funds were to come from the state treasury, and the state was thus the real party in interest. In *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 221 (1873), the Court held that a state which had permitted itself to be sued in its own courts thereby waived an Eleventh Amendment immunity.

Hans and its progeny overtly disdain precisely the literal reading of the Amendment espoused in *Cohens* and *Bright*. *Hans* itself, in holding that the states enjoy immunity from the exercise of federal question jurisdiction, expressly departed from the contrary conclusion in *Cohens*. The holding in *Edelman v. Jordan* is precisely the opposite of the rule established by *Osborn*. Federal jurisdiction over suits against a state by a foreign nation, recognized in both *Cohens* and *Cherokee Nation*, was held to be precluded by the Eleventh Amendment in *Monaco v. Mississippi*, 292 U.S. 313 (1934). Federal admiralty jurisdiction over the states, expressly sustained in *Bright*, was rejected in *Ex parte New York*, 256 U.S. 490 (1921). The rule of *Davis v. Gray*, that a waiver of sovereign immunity in state courts works a waiver of Eleventh Amendment immunity, was limited in *Smith v. Reeves*, 178 U.S. 436 (1900).

Hans and its progeny have created a bewildering set of rules. Nowhere is the unpredictability of these rules better illustrated than in this case. Over a decade after section 504 was enacted, California had challenged the section based on

Eleventh Amendment cases decided post enactment. California's challenge occurs even though scores of federal court section 504 decisions have been rendered involving the states.⁹⁶ In the name of *Hans* the United States would have Congress consider the applicability to the states of each federal court remedy before the remedy could be available to rectify even the most clear cut act of discrimination. *Hans* and its progeny are unsound in principle and execution. This Court should reconsider *Hans* and overrule it. Cf. *Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913 (February 19, 1985).

⁹⁶ See, e.g., *Southeastern Community College v. Davis*, *supra*; *University of Texas v. Camenisch*, *supra*; *Pushkin v. Regents of the University of Colorado*, *supra*; *Strathie v. Pennsylvania Dept. of Transportation*, 716 F.2d 227 (3rd Cir. 1983); *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982); *Sherry v. New York State Educational Dept.*, 479 F.Supp. 1328 (W.D.N.Y. 1979); *Brookhart v. Illinois State Board of Education*, 697 F.2d 179 (7th Cir. 1983); *Morlock v. Ohio*, 563 F.Supp. 15 (D. Ohio 1982); *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983); *Ferris v. University of Texas*, 558 F.Supp. 536 (W.D.Tex. 1983); *Georgia NAACP v. Georgia*, 570 F.Supp. 314 (S.D.Ga. 1983).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

February, 1985

Respectfully submitted,

JOSEPH LAWRENCE

MARILYN HOLLE

Counsel of Record

J. LE VONNE CHAMBERS

ERIC SCHNAPPER

ALAN IDES

MARY-LYNNE FISHER

STANLEY FLEISHMAN

Attorneys for Respondent

Douglas James Scanlon

Respondent gratefully acknowledges the assistance of Victoria Berberi, Sung Kim, Edward Manning and Stephen Olsen, Class of 1985, Loyola Law School, Los Angeles, California, and Amy E. Hewitt, Class of 1985, Whittier College School of Law, Los Angeles, California, in the preparation of this brief.

APPENDIX

APPENDIX A

ADDITIONAL CONSTITUTIONAL PROVISIONS

1. The Spending Clause—Article I, Section 8, Clause 1, of the United States Constitution:

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

2. Article III, Section 2, Clauses 1 and 2, of the United States Constitution:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

3. The Supremacy Clause—Article VI, Clause 2, of the United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX B

Recent Scholarship Regarding State Immunity under Article III and The Eleventh Amendment

C. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 5-65 (1972).

Cullison, *Interpretation of the Eleventh Amendment*, 5 *Houston L. Rev.* 1 (1967) (no immunity where state violates federally created rights).

Field, *The Eleventh Amendment And Other Sovereign Immunity Doctrines: Part One*, 126 *U. Pa. L. Rev.* 515 (1977) (Hans incorrectly decided).

Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than A Prohibition Against Jurisdiction*, 35 *Stan. L. Rev.* 1033 (1983) (Eleventh Amendment has no effect on federal question jurisdiction).

Gibbons, *The Eleventh Amendment and Sovereign Immunity: A Reinterpretation*, 83 *Col L. Rev.* 1890 (1983) (Eleventh Amendment has no effect on federal question jurisdiction).

LeClerq, *State Immunity and Federal Power—Retreat from National Supremacy*, 27 *U. Fla. L. Rev.* 361 (1975) (Hans incorrectly decided).

Liberman, *State Sovereign Immunity In Suits To Enforce Federal Rights*, 1977 *Wash. U.L.Q.* 195 (Hans interpretation of Eleventh Amendment incorrect).

Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 *Ga. L. Rev.* 207 (1968) (history of adoption of Article III and the Eleventh Amendment).

McCormack, *Inter-governmental Immunity and the Eleventh Amendment* 51 *N.C.L. Rev.* 485 (1973) (no state immunity in federal question cases).

Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the*

Eleventh and Fourteenth Amendments, 75 Col. L. Rev. 1413 (1975) (history of adoption of Article III and the Eleventh Amendment).

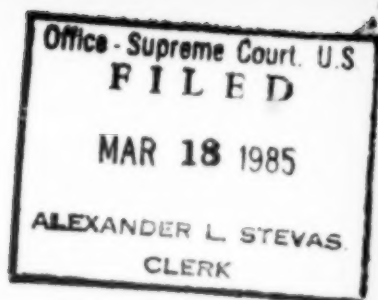
Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv. L. Rev. 61 (1984) (Hans incorrectly decided.)

Thornton, The Eleventh Amendment: An Endangered Species, 55 Ind. L. J. 293 (1980) (Hans incorrectly decided).

Note, State Monetary Accountability for Civil Rights Violations: Reconciling the Eleventh and Fourteenth Amendments, 43 Albany L. Rev. 708 (1979) (Hans incorrectly decided).

No. 84-351

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984



ATASCADERO STATE HOSPITAL
and CALIFORNIA DEPARTMENT
OF MENTAL HEALTH,

Petitioners,

vs.

DOUGLAS JAMES SCANLON,

Respondent.

PETITIONERS' REPLY BRIEF

JOHN K. VAN DE KAMP

Attorney General

of the State of California

CHARLTON G. HOLLAND, III

Assistant Attorney General

ANNE S. PRESSMAN

Supervising Deputy Attorney General

JAMES E. RYAN

Deputy Attorney General

Counsel of Record

G. R. OVERTON

Deputy Attorney General

Suite 800

3580 Wilshire Boulevard

Los Angeles, CA 90010

(213) 736-2279

Attorneys for Petitioners

TOPICAL INDEX

	Page
TABLE OF AUTHORITIES	ii
I INTRODUCTION	1
II NEITHER THE STATUTORY LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE REHABILITATION ACT REVEAL AN UNEQUIVOCAL INTENT TO ABROGATE STATES' IMMUNITY	2
1. Inclusion of States Within the Coverage of the Rehabilitation Act and the Implication of a Private Remedy Are Propositions Which Are Not Directed Toward the Essential Issue Before the Court	2
2. The Remedial Provisions of the Rehabilitation Act Represent Exercises of Congress' Spending Power. Irrespective of the Power Employed, However, Congressional Intent to Abrogate States' Immunity Must Be Explicit	5
III CALIFORNIA HAS NOT WAIVED ITS IMMUNITY OR CONSENTED TO SUIT BY VIRTUE OF STATE LAW	10
IV APPLICATION OF A CLEAR STATEMENT RULE TO THE REMEDIAL PROVISIONS OF THE REHABILITATION ACT IS NOT IMPERMISSIBLY RETROACTIVE	14
V. RECONSIDERATION OF THE DECISION IN <i>HANS V. LOUISIANA</i> IS INAPPROPRIATE AND UNNECESSARY IN THIS CASE	18
VI CONCLUSION	19

TABLE OF AUTHORITIES

	Page
Cases	
Chandler v. Dix (1904)	
194 U.S. 590	13
Consolidated Rail Corp. v. Darrone (1984)	
___U.S.___, 104 S.Ct. 1248	2, 6, 9
Edelman v. Jordan (1974)	
415 U.S. 651	5, 8, 9, 13, 14
EEOC v. Wyoming (1983)	
460 U.S. 226	7
Employees v. Missouri Public Health Dept. (1973)	
411 U.S. 279	3, 4, 5, 9, 14, 15
Fitzpatrick v. Bitzer (1976)	
427 U.S. 445	5, 8, 14
Florida Dept. of Health v. Fla. Nursing Home Assn. (1981)	
450 U.S. 147	17
Gilliam v. City of Omaha (D. Neb. 1975)	
388 F.Supp. 842	9
Great Northern Ins. Co. v. Read (1943)	
322 U.S. 47	13
Guardians Ass'n. v. Civ. Serv. Com'n. of City of New York (1983)	
___U.S.___, 104, S.Ct. 3221	6, 7

Hall v. University of Nevada (1973)	
8 Cal.3d 522, 503 P.2d 1363	13
Hans v. Louisiana (1890)	
134 U.S. 1	18, 19
Hutto v. Finney (1978)	
437 U.S. 678	8, 9, 10
Maurice v. State of California (1944)	
43 Cal.App.2d 270, 110 P.2d 706	13
Murray v. Wilson Distilling Co. (1908)	
213 U.S. 151	11
Muskopf v. Corning Hospital Dist. (1961)	
55 Cal.2d 211, 359 P.2d 457	10, 11, 12
Parden v. Terminal R. Co. (1964)	
377 U.S. 184	14, 15, 16
Pennhurst State School v. Halderman (1981)	
451 U.S. 1	6, 7, 17, 18
Pennhurst State School & Hosp. v. Halderman (1984)	
——U.S.——, 104, S.Ct. 900	5, 9, 17
Petty v. Tennessee-Missouri Comm'n. (1959)	
359 U.S. 275	13, 15, 16
Quern v. Jordan (1979)	
440 U.S. 332	3, 5, 8
Southeastern Community College v. Davis (1979)	
442 U.S. 397	4

Statutes

California Government Code	
§ 12940	13
§ 12965(b)	12, 13

Federal Statutes

Civil Rights Act of 1964	
Title VI (42 U.S.C. § 2000d)	6, 7, 9, 14
Fair Labor Standards Act	
§ 3(d)	3
§ 16(b)	3
Rehabilitation Act of 1973	passim

Constitutions

California Constitution	
Article III, § 5	10, 11
United States Constitution	
Eleventh Amendment	passim
Fourteenth Amendment § 5	5, 6, 7, 8

No. 84-351

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

ATASCADERO STATE HOSPITAL
and CALIFORNIA DEPARTMENT
OF MENTAL HEALTH,

Petitioners,

vs.

DOUGLAS JAMES SCANLON,

Respondent.

PETITIONERS' REPLY BRIEF

I

INTRODUCTION

Time and space limitations do not allow for a detailed treatment of each of the arguments offered by respondent and *amici*. Petitioners have attempted in the following to discuss at least the principal points raised in the opposing briefs.

II

NEITHER THE STATUTORY LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE REHABILITATION ACT REVEAL AN UNEQUIVOCAL INTENT TO ABROGATE STATES' IMMUNITY

- 1. Inclusion of States Within the Coverage of
the Rehabilitation Act and the Implication of
a Private Remedy Are Propositions Which
Are Not Directed Toward the Essential Issue
Before the Court**

Respondent devotes much of his brief to establishing propositions which are either not contested herein or miss the mark as to the essential issue before this Court.

For example, respondent refers extensively to remarks in the Congressional Record and to portions of Committee hearings and reports for the purpose of establishing an understanding and intent on the part of Congress to include States within the ambit of section 504 of the Act. (Rehabilitation Act of 1973, 87 Stats. 394, as amended, 29 U.S.C. §794.) Respondent also notes that this Court in *Consolidated Rail Corp. v. Darrone* (1984) ____U.S____, 104 S.Ct. 1248, 1255, n. 16, declared that by its 1978 amendments to the Act Congress codified existing regulations, which, in turn, define recipients to include States (45 C.F.R. Pt. 84.3(f)). (Resp. Br. pp. 6-14.)

These references demonstrate nothing more than precisely what they say — that States are included within the general terms of the Act. This is not an observation which is challenged by petitioners. The point of contention,

however, is what *are* the terms of the Act. Respondent's arguments steer away from that inquiry.

It bears repeating, therefore, that the inquiry to be addressed in the instant case is whether the Rehabilitation Act of 1973 by clear language on its face indicates Congressional intent to sweep away States' Eleventh Amendment immunity. *Quern v. Jordan* (1979) 440 U.S. 332, 345.

In affirming this standard of clear language, the Court in *Quern* quoted from and relied upon the decision in *Employees v. Missouri Public Health Dept.* (1973) 411 U.S. 279. The *Employees* case is one closely analogous to the case at bar and bears particular discussion because it demonstrates the tangential nature of respondent's argument respecting States being covered under the Rehabilitation Act.

In *Employees* the Court was called upon to examine a claimed abrogation of States' immunity under the Fair Labor Standards Act. Section 16(b) of that Act specifically authorized a private cause of action in any court of competent jurisdiction against any employer which was covered by and in violation of the Act.

Section 3(d) of the FLSA expressly included States as employers within the ambit of the Act's coverage, leaving the Court to preliminarily conclude:

"By reason of the literal language of the present Act, Missouri and the departments joined as defendants are constitutionally covered by the Act." 411 U.S. at p. 283.

Yet, notwithstanding this explicit inclusion of States as employers under the Act and the express authorization of a private remedy against any employer in all courts, this

Court found that no abrogation of States' immunity under the Eleventh Amendment had been effected.

As identified by the Court, when the issue is whether sovereign immunity has been abrogated by Congress, the inquiry is not whether States are subject to the Act in general. Rather, the pertinent inquiry must focus on "whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in federal court." 411 U.S. at p. 283.

In the *Employees* case the Court was unable to find in the statutory language before it any clear language that States' constitutional immunity had been swept away and refused to presume such intent on the part of Congress in the absence of such expression. 411 U.S. at pp. 284-285.

The statutory language in the Rehabilitation Act is even less pervasive than that reviewed in *Employees*. Although States are included by regulation within the definition of "recipients," the Act itself does not explicitly provide for a private remedy, in federal or any other court.

Thus, it avoids the true issue here for respondent to expend his energy in an effort to demonstrate that States are recipients under the Rehabilitation Act. The same can be said as to his discussion on the existence of an implied private remedy under the Act. Not only has that point remained uncontested in these proceedings,¹ but any such

¹ Respondent (Resp. Br. p. 19) and *amicus* (ACLU Br. p. 13, n. 17) allude to an *amicus* brief filed by the State of California in *Southeastern Community College v. Davis* (1979) 442 U.S. 397, as evidencing an inconsistency in the position of the present State defendants on the question of Eleventh Amendment immunity. Such a suggestion is clearly spurious since sovereign immunity was not an issue addressed by the parties in that case and, perforce, as *amicus*, California did not and was in no position to raise or discuss that prospect.

demonstration again fails to focus on the critical issue here. (Resp. Br. pp. 18-23.)

None of the arguments or references offered by respondent serves to answer the essential question — did Congress consider and firmly decide to abrogate the Eleventh Amendment immunity of the States? *Quern v. Jordan*, *supra*, 440 U.S. at p. 345.

This Court's decisions have consistently required that if such abrogation is intended, it must be explicitly so stated in the relevant statutory language. *Pennhurst State School & Hosp. v. Halderman* ("Pennhurst II") (1984) ____U.S____, 104 S.Ct. 900, 907; *Quern v. Jordan*, *supra*; *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 451-452; *Edelman v. Jordan* (1974) 415 U.S. 651, 672; *Employees v. Missouri Public Health Dept.*, *supra*.

The Rehabilitation Act is silent concerning abrogation of States' immunity. Moreover, even if one is permitted to search the legislative materials, as respondent has apparently extensively done, not a single reference is found therein evidencing Congressional consideration of States' Eleventh Amendment immunity and a determination to sweep away that immunity.

2. The Remedial Provisions of the Rehabilitation Act Represent Exercises of Congress' Spending Power. Irrespective of the Power Employed, However, Congressional Intent to Abrogate States' Immunity Must Be Explicit

Respondent and *amicus* also devote considerable discussion to the question of what power Congress exercised in enacting the relevant portions of the Rehabilitation Act. (Resp. Br. pp. 14-17; ACLU Br. pp. 4-5.) They submit that section 5 of the Fourteenth

Amendment was the font of authority. Petitioners have argued that the constitutional source was the Spending Clause. (Pet. Br. pp. 67-71.)²

Petitioners agree that determining the source of power relied upon by Congress in any given legislation does not admit of easy resolution. There has not been extensive treatment in the case law on this question. The only decision of this Court, however, which addresses this issue in the context of a statute analogous to the Rehabilitation Act does provide some guidance.

The Court in *Consolidated Rail Corp. v. Darrone*, *supra*, at p.1250, observed that the anti-discrimination language employed in section 504 is virtually identical to that of section 601 of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. § 2000d). Both statutes proscribe discrimination under any program or activity receiving federal financial assistance. Indeed, respondent throughout his brief relies on this link between the two statutes in

² It is stated by respondent that petitioners conceded in both the District Court and Appellate Court that section 504 represented a Fourteenth Amendment exercise. This statement is both inaccurate and misleading. The reference to the record (C.R. 12 at 3) which respondent cites in this regard is to a six-page reply memorandum of points and authorities filed by petitioner in the District Court in January 1980. This, of course, was considerably prior to petitioners' having had the benefit of this Court's discussions respecting Fourteenth Amendment exercises vis a vis those under the Spending Clause in *Guardians* (1983), *infra*, and *Pennhurst I* (1981), *infra*. Moreover, neither of petitioners' briefs filed in the Ninth Circuit assumed that Congress had utilized the Fourteenth Amendment. Changes in legal theory, in any event, do not represent the introduction of new "issues," as contended by respondent (Resp. Br. p. 17, fn.26), particularly when the question was a point of dispute throughout the appellate proceedings.

positing his arguments concerning the breadth and scope to be accorded section 504.

In *Guardians Ass'n. v. Civ. Serv. Com'n. of City of New York* (1983) ____ U.S. ____, 104 S.Ct. 3221, 3230, this Court held that section 601 of Title VI represented Spending Power legislation:

"It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed.' ... (Citation omitted.)"

Other than a singular reference to identical comments by Senators Cranston and Stafford respecting the recovery of attorney's fees (Resp. Br. p.16), which petitioners have previously distinguished (Pet. Br. pp. 75-77), the legislative record contains no reference to utilization of Fourteenth Amendment power in connection with the Act. While this Court has indicated that it will not require Congressional declarations of this nature in testing the constitutionality of an enactment, *EEOC v. Wyoming* (1983) 460 U.S. 226, 243-244, n. 18, neither will it presume an exercise of Fourteenth Amendment power in order to validate a proffered construction of a statute. *Pennhurst State School v. Halderman* ("Pennhurst I") (1981) 451 U.S. 1, 16.

Petitioners are not unmindful of the references in the Congressional Record to the effect that section 504 "guarantees the civil rights of the handicapped" and "provides equal education and employment opportunities" for same. These phrases, though, must be balanced against the fact that Congress elected to declare those rights and to proscribe their deprivation only as to those programs and activities receiving federal funds. In other words, as with Title VI, Congress limited its scope to restrict only those who were the grantees of an exercise of its Spending Clause

power. Thus limited, the statute would seem indicative of an exercise of only Spending Clause power, as opposed to an all-inclusive proscription under the Fourteenth Amendment.

Even if the relevant provisions of the Rehabilitation Act are an exercise of section 5 of the Fourteenth Amendment, the Act still fails to abrogate States' immunity. *Edelman*, *Fitzpatrick* and *Quern*, *supra*, each of which concerned Fourteenth Amendment legislation, all confirmed the requirement of express statutory abrogation. (See, Pet. Br. p.68.)

Respondent and *amici* continue to make too much of this Court's holding in *Hutto v. Finney* (1978) 437 U.S. 678, in suggesting that it supports application of a different rule. In finding abrogation of States' immunity for purposes of attorney's fees awards, the Court was influenced by three factors not present in the instant case.

First, the relief at issue in *Hutto* involved attorney's fees, which the Court characterized as costs, which "have traditionally been awarded without regard for the States' Eleventh Amendment immunity." *Id.* at p.695. The respondent here, however, seeks, among other relief, damages for prelitigation conduct, precisely the kind of extension of its decision against which the *Hutto* majority cautioned. *Id.* at pp. 695, 697, n.27.

Secondly, the Act examined in *Hutto* provided a legislative history which focused directly on the immunity problem posed by the Eleventh Amendment and which revealed at least two occasions where Congress expressly rejected attempted amendments of the Act aimed at immunizing States. The Rehabilitation Act, in contrast, provides no such history. To the contrary, when Congress effected amendments to the Act in 1978 it declined to

address the immunity issue despite the fact that the only court decision to decide the question in the analogous context of Title VI, *Gilliam v. City of Omaha* (D. Neb. 1975) 388 F.Supp. 842, 847, affirmed without mention of remedies (8th Cir. 1975) 524 F.2d 1013, upheld the Eleventh Amendment.

Finally, the majority in *Hutto* was persuaded by the prospect that to disallow fees against States would render the subject statute meaningless. *Id.* at p.698, n.31. Respondent has made the same argument here with respect to damages (Resp. Br. p. 28), but his contention rings hollow. Given the stated goal of the Rehabilitation Act, to promote and expand employment opportunities for the handicapped, *Consolidated Rail Corp. v. Darrone, supra*, 104 S.Ct. at p. 1255, provisional relief is certainly the more apt remedy. To assert that the non-availability of damage actions against States in federal court renders the Act meaningless is to ignore also the remedies available through government enforcement, suit in state court and injunctive actions against state officials in federal courts. (See, *Pennhurst II, supra*, 104 S.Ct. 900, 919-920; *Employees v. Missouri Public Health Dept., supra*, 411 U.S. at p.287.)

Thus, neither the nature of the relief at issue nor the other aforementioned considerations which influenced the result in *Hutto* have application to the present case. The requirement of express abrogation set forth in *Edelman* and its progeny controls the inquiry in the present case, irrespective of the source of Congress' power. Such a requirement stems from sound policy considerations, which the Eleventh Amendment itself embodies, and which recognize the vital role of the doctrine of sovereign immunity in our federal system, *Pennhurst II, supra*, 104 S.Ct. at p.907, and ensures that attempts to limit States'

power are unmistakable. *Hutto v. Finney*, *supra*, 437 U.S. at p. 706 (separate opinion of J. Powell, joined in by The Chief Justice, concurring in part and dissenting in part).

III

CALIFORNIA HAS NOT WAIVED ITS IMMUNITY OR CONSENTED TO SUIT BY VIRTUE OF STATE LAW

Respondent asserts, for the first time, that California, by consenting to suits against it in its own courts or waiving immunity to suits in its courts, has consented to suits brought against it in federal courts. (Resp. Br., pp. 29-32.) This contention, although appearing for the first time in this suit, is neither novel nor is it valid.

Central to respondent's argument is reliance on Article III, section 5 of the California Constitution and *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211; 359 P.2d 457.

In *Muskopf*, *supra*, the California Supreme Court invalidated common law tort immunity in this State. (*Id.*, pp. 213-217.) In conclusion the majority observed that:

“...[I]n holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we make no startling break with the past....”

Contrary to respondent's assertions, *Muskopf* did not sweep away all governmental immunity. *Muskopf* did end judicially created tort immunity, but not other immunities, such as the bar of the Eleventh Amendment to suit in federal court, to which *Muskopf* never alluded.

It has long been established that a State's waiver of its Eleventh Amendment immunity will not be lightly inferred

by the federal courts. This Court established the standard early in this century in *Murray v. Wilson Distilling Co.* (1908) 213 U.S. 151, when it held that a waiver of Eleventh Amendment immunity:

“...could only be warranted if exacted by the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction.” (*Id.*, 171.)

Although the *Murray* standard of explicitness was announced by this Court in respect to legislation, there is no logical reason why a court created waiver should not be held to the same standard. Since *Muskopf* only discussed common law tort immunity, it should not lightly be construed to effect the constitutional immunity embodied in the Eleventh Amendment. Certainty of expression should govern the restrictions placed on constitutional guarantees, both by the Legislature and the Judiciary.

Respondent's reliance on Article III, section 5 of the California Constitution, thus, is not helpful to his position. That provision states:

“Suits may be brought against the State in such manner and in such courts as shall be directed by law.”

In construing that language, the California Supreme Court in *Muskopf* stated:

“On its face, it seems to say that the State may be held liable when suits are brought against it in accordance with a legislatively prescribed procedure. Consistent, however, with our previous construction of essentially identical statutory language, we held that Article XX, Section 6, provides merely for a legislative consent to suit.” (*Muskopf, supra*, at p.218.)

Although the California Supreme Court appeared to minimize the importance of having a legislative waiver of judicially created tort immunity, *Muskopf* can only be read to mean that as to other, non-judicially created immunity, only the State Legislature can waive such immunities by appropriate legislation.

In retreat, respondent asserts that California has waived, by legislation, its Eleventh Amendment immunity.³ (Resp. Br., p.31.) Relying on California Government Code section 12965(b), dealing with *State* created remedies for employment discrimination, respondent fails to address the context and scope of that legislation and, in particular, subdivision (b), which states:

“(b) If an accusation is not issued within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue the department shall promptly notify, in writing, the person claiming to be aggrieved. Such notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization or employment agency named in the verified complaint within one year from the date of such notice. *The superior, municipal, and justice courts of the State of California shall have jurisdiction of such actions, and the aggrieved person may file in any of these courts ... Such actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to*

³ Petitioners have already discussed the inapplicability of an implied waiver by virtue of petitioners' alleged receipt of federal funds and will not repeat same here. (See, Pet. Br., pp. 63-65.)

be aggrieved where such persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants ..."
(Emphasis added.)

A fair reading of section 12965(b) requires a finding that the Legislature has invested the State Courts with jurisdiction to determine civil disputes encompassed by the State's fair employment legislation. (Cal. Gov. Code, § 12940 et seq.) Petitioners have acknowledged that this act provides a remedy against State employers in State Courts. The respondent limits his discussion to the last quoted sentence of subdivision (b). The actions referred to in that sentence relate back to the actions which may be filed in State Courts earlier in the subdivision. No intent, and certainly no clear legislative expression to waive Eleventh Amendment immunity can be gleaned from section 12965(b) when read in context.

Mere waiver of State immunity from suit in its own courts is insufficient to waive immunity from suit in federal court. (*Chandler v. Dix* (1904) 194 U.S. 590, 591; *Great Northern Ins. Co. v. Read* (1943) 322 U.S. 47, 55; *Petty v. Tennessee-Missouri Comm'n.* (1959) 359 U.S. 275, 276-277; and *Edelman v. Jordan*, *supra*, 415 U.S. at p. 677, n. 19.)

Lastly, respondent asserts that *Maurice v. State of California* (1944) 43 Cal.App.2d 270, 110 P.2d 706, and *Hall v. University of Nevada* (1973) 8 Cal.3d 522, 503 P.2d 1363, require a finding that the State has waived its immunity. Reliance on these cases is misplaced inasmuch as both actions arose in State Court and never involved immunity under the Eleventh Amendment.

IV

APPLICATION OF A CLEAR STATEMENT RULE TO THE REMEDIAL PROVISIONS OF THE REHABILITATION ACT IS NOT IMPERMISSIBLY RETROACTIVE

In the *amici* brief filed on behalf of Senator Cranston, et al., it is urged that requiring an express abrogation under section 504 impermissibly applies a standard which was not in effect at the time that statute was enacted. Such an argument misses the most salient point. The express abrogation requirement announced in *Employees, supra*, *Edelman, supra*, and *Fitzpatrick, supra*, was firmly entrenched in sovereign immunity law at the critical point in time, 1978, when Congress chose to provide aggrieved beneficiaries of the Act the remedies, procedures and rights set forth in Title VI by adding section 505(a)(2) to the Act.

Having claimed that Congress relied on *Parden v. Terminal R. Co.* (1964) 377 U.S. 184 as the reigning theory on immunity when section 504 was enacted, *amici* cannot now disclaim knowledge of the reigning theory, as found in *Employees, Edelman* and *Fitzpatrick*, when it took action in 1978 to provide relief for violations of section 504.

Furthermore, the reliance placed on the *Parden* decision would have been unfounded. While the Court in that case declined to require express inclusion of States as covered "employers" under the Federal Employers' Liability Act, it did so under admittedly unique circumstances. The Court alluded to the *unique* legislative and case law precedent respecting governmental control over interstate rail carriers, by virtue of which the Court felt constrained to

find a waiver, setting that case apart from all others on the issue of waiver:

“ The fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. In fact, the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included. [*California v. Taylor* (1957)] 353 U.S., at 564.’

“...Thus we could not read the FELA differently here without undermining the basis of our decision in *Taylor*.” 377 U.S. at 189. (Insert added.)

The Court in *Parden* was also influenced by its concern that an exemption of States from liability would have rendered the remedy provided under the FELA meaningless, *Id.*, at p.190, and by the fact that the activity at issue was of a “commercial” nature. *Id.*, at pp. 196-198.

That the *Parden* decision stands as a unique and isolated exception to the settled rule on waiver of immunity has been noted by this Court:

“...The dramatic circumstances of the *Parden* case, which involved a rather isolated state activity can be put to one side.” *Employees v. Missouri Public Health Dept.*, *supra*, 411 U.S. at 285.

In *Petty v. Tennessee-Missouri Comm’n.* (1959) 359 U.S. 275, also cited by *amici*, the Court simply found that the defendant States had expressly consented to suit by executing a compact which contained a specific Congressional condition that the parties so consent.

Thus, the reigning theory on abrogation of immunity concerning statutes which did not present the unique circumstances of *Parden* and *Petty* was more aptly described in the dissenting opinion in *Parden*:

‘[W]aiver of sovereign immunity will be found only where stated by ‘the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction’. *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 468-470.” 377 U.S. at pp. 199-200.

The fact that there is even a dispute as to what was the applicable standard on abrogation at a given point in time serves to demonstrate the encroachment on States’ sovereignty inherent in *amici*’s underlying postulation. That proposition seems to be that Congress, alone, should determine whether abrogation should be attempted and it, alone, should decide whether it has, in fact, done so effectively.

It is the latter part of this proposition which creates a paradox. Although *amici* attempts to draw a distinction between “interpretive” and “prescriptive” approaches to describe this Court’s Eleventh Amendment decisions, the distinction is a self-created and ambiguous one. For, if the judiciary declines to examine legislation for the necessary Congressional intent, it not only abdicates its role under the Constitutional plan, but by finding abrogation absent clear language the Court performs the very function which *amici* seek to restrict. The Court becomes the ultimate policy-maker on questions of immunity.

To the contrary, by requiring a clear expression of intent to abrogate, the determination to subject States to suit is left

in Congress where *amici* would have it. The Court's role, then, is to declare whether that determination has, in fact, been made by Congress.

On the other hand, when Congress fails to clearly express its intent, it shifts the critical policy determination to the courts. This shifting, which *amici* asserts constitutes an impermissible assumption by the courts of the legislative function, is obviated if Congress merely enacts legislation which puts everyone on notice, including the courts, as to what its intentions are respecting abrogation.

"*Edelman* ... is not so restrictive that Congress may not mitigate its impact by unambiguously conditioning state participation in federal programs on a waiver of the Eleventh Amendment defense." *Florida Dept. of Health v. Fla. Nursing Home Assn.* (1981) 450 U.S. 147, 153 (opinion of J. Stevens, concurring).

Absent such clarity in the subject legislation, the Court has refused to sweep away States' immunity. "Article III confers no jurisdiction on this Court to strip an explicit Amendment of the Constitution of its substantive meaning." *Pennhurst II*, *supra*, 104 S.Ct. at p.912, n.17.

The extent to which respondent and *amici* have searched and referred to the legislative materials in attempting to supply the requisite Congressional intent demonstrates the practical justification for the express language requirement. This is particularly so where the legislation stems from the Spending Power, which this Court has declared to be in the nature of a contract. *Pennhurst I*, *supra*, 451 U.S. at p. 17. Accordingly, if Congress intends to impose a condition on the grant of federal funds (such as waiver of sovereign immunity), it must do so unambiguously. *Id.*

States must not be required to conduct examinations of the Congressional Record, transcripts of Committee hearings and Committee reports in order to determine whether its participation in a program will constitute a forfeiture of its Constitutional immunity. Rather, clear notice of all conditions which attach to its participation should be provided by Congress. *Id.*, at p.25.

V

**RECONSIDERATION OF THE DECISION
IN *HANS V. LOUISIANA* IS INAPPROPRI-
ATE AND UNNECESSARY IN THIS CASE**

Raising an issue not necessary to a resolution of the question presented by petitioners and not mentioned in any of the proceedings below, respondent urges as an argument of last resort that this Court reexamine and overrule the decision in *Hans v. Louisiana* (1890) 134 U.S. 1 "insofar as it limits federal court jurisdiction over federal question cases." (Resp. Br., p. 33.)

The question presented in the instant petition neither raised this issue nor requires a reconsideration of *Hans* in order for there to be a resolution herein. Whether the Rehabilitation Act constitutes an effective abrogation of sovereign immunity is a question which can and should be decided in accord with settled and accepted principles of Eleventh Amendment law, upon which the parties and courts below have relied, not upon a belated effort to upset those principles and reinvent immunity doctrine.

In anticipation of the possibility of respondent's urging such a position, in petitioners' opening brief we requested that if this Court resolves to reconsider the longstanding

precedent of *Hans* it should set the issue for separate briefing and argument. (Pet. Br., pp. 81-82.) Such a suggestion is echoed by *amicus*. (ACLU Br., p. 17.)

VI

CONCLUSION

The decision of the Court of Appeals should be reversed.

DATED: March 15, 1985

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of
the State of California
CHARLTON G. HOLLAND, III,
Assistant Attorney General
ANNE S. PRESSMAN,
Supervising Deputy
Attorney General
JAMES E. RYAN,
Deputy Attorney General
Counsel of Record
G. R. OVERTON,
Deputy Attorney General

Attorneys for Petitioners